Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
BARRY L. GOLDSTEIN
BILL LANN LEE
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030

Counsel for Petitioner

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In the

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October Term, 1975

No. 74-768

Clarence Brown,

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General Services Administration, *et al.*

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 507 F.2d 1300, and is set forth in the Appendix to the Petition, pp. 2a-18a. The opinion order of the District Court, which is not reported, is set forth in the Appendix to the Petition, p. 1a.

Jurisdiction

The judgment of the Court of Appeals was entered on November 21, 1974. The Petition was filed on December 20, 1974 and granted on May 27, 1975. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Is jurisdiction over this action conferred by statutes enacted prior to the adoption in 1972 of section 717 of Title VII?

2. Was this action properly dismissed for failure to exhaust administrative remedies?

Statutory Provisions Involved

Section 717(a) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(a), provides:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex or national origin.

Section 717(c) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e-16(c), provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 1981, 42 U.S.C., provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1331(a), 28 U.S.C., provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Section 1343(4), 28 U.S.C., provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • • • •

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1346, 28 U.S.C., provides in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

• • • • •

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Section 1361, 28 U.S.C., provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States of any agency thereof to perform a duty owed to the plaintiff.

Statement of the Case

Petitioner is black and has for eighteen years been an employee of the General Services Administration, hereinafter "GSA".[1] (A. 4a) He is a GS-7 but has been certified eligible and rated "highly qualified" for a GS-9 position. He has for the past eight years been repeatedly denied that GS-9 promotion. (A. 15a-17a)

[1] Subsequent to the filing of the Petition for Writ of Certiorari, petitioner was transferred to another government agency. That lateral transfer has no effect on his claim for back pay or injunctive relief. Petitioner is still a GS-7 and still wants the specific GS-9 position in the General Services Administration for which he applied in 1971.

October 19, 1970, the names of petitioner and two whites were submitted to petitioner's white supervisor for the filling of a GS-9, Communications Specialist, vacancy; all of the candidates were rated "highly qualified;" a white obtained the promotion. Immediately thereafter, petitioner contacted his Equal Employment Opportunity Counsellor at GSA and was advised to withhold a formal complaint of discrimination because two new GS-9 vacancies were imminent; petitioner complied with the EEO Counsellor's request and terminated proceedings. (A. 36a)

June 15, 1971, the names of petitioner and two whites were submitted to petitioner's supervisor for the filling of a GS-9 vacancy; on this occasion only petitioner and one of the white candidates were rated "highly qualified;" a white candidate was again selected. On July 15, 1971, petitioner filed his Complaint of Discrimination against the Director of the Transportation and Communications Service and the Chief of the Commissions Division, GSA.

Petitioner's complaint alleged *inter alia*, that he had been seeking a promotion since 1967 to a GS-9 position and that in every instance he had been rejected because of his race. (A. 5a-15a) The agency investigation revealed that petitioner had been repeatedly passed over for promotion in favor of white employees. In addition, subsequently published statistics reveal that, while blacks are employed at GSA in significant numbers in grades GS-7 and lower, they are clearly under-represented in all grades GS-8 and above (Appendix A, *infra*, p. 1aa). October 19, 1972, GSA notified petitioner that on the basis of the investigative file it proposed to find that it had not discriminated against him and advised him of his right to a hearing. (A. 30a)

December 13, 1972, a hearing was held on petitioner's complaint. February 9, 1973, the Hearing Examiner found, on the basis of petitioner's supervisors' testimony, that the whites selected for the positions in contest were more "cooperative" than the petitioner and, accordingly, that petitioner was not passed over because of his race. (A. 40a)

March 23, 1973, twenty months after petitioner filed his administrative complaint, GSA issued its final agency decision concluding that it had not discriminated against petitioner on the basis of race.[2] (A. 43a)

Petitioner was notified of the agency decision on March 26, 1973. (A. 45a) The letter of notification advised him that he could within 30 days commence a civil action in the United States District Court, or within 15 days file an appeal to the Appeals Review Board of the Civil Service Commission. On the basis of this letter petitioner decided to file suit. Because petitioner had great difficulty locating an attorney who would represent him, he did not succeed in filing his complaint until May 7, 1973, 12 days after the deadline for filing an action under section 717.[3]

[2] On August 10, 1973, the government moved to dismiss this action in the district court on the ground, *inter alia*, that petitioner had not commenced his action within the 30 days required under section 717. On July 27 and September 24, 1973 the same United States Attorney filed memoranda in the same district court, in *Henderson* v. *Defense Contract Administration Services*, 370 F.Supp. 180 (S.D. N.Y. 1973), arguing that section 717 did not apply to employees such as petitioner who were the victims of discrimination prior to March 24, 1972.

[3] Within a week of receiving the letter of March 23, petitioner presented himself and the letter to the clerk of the United States District Court for the Southern District of New York, where the *pro se* clerk advised him to retain a private attorney. Compare, *Huston* v. *General Motors Corp.*, 477 F.2d 1003 (8th Cir. 1973). Prior to obtaining the services of counsel, petitioner unsuccessfully sought assistance from three other attorneys and several civil rights organizations.

However, petitioner asserted federal jurisdiction under several statutes other than §717.

On September 27, 1973, the District Court for the Southern District of New York dismissed the action for lack of jurisdiction (Petition, p. 1a). On November 21, 1974, the Court of Appeals for the Second Circuit affirmed that dismissal (Petition, pp. 2a-18a). The Second Circuit concluded: (1) that section 717 had, by implication, repealed *pro tanto* the Tucker Act, the Mandamus Act, the 1866 Civil Rights Act, the Administrative Procedure Act, and the other statutes which petitioner asserted created federal jurisdiction; (2) that section 717 applied to discrimination occurring prior to its effective date, March 24, 1972, and that the implied repeal was accordingly retrospective; and (3) that in any event, petitioner could not sue because he had not filed an appeal from the final agency decision to the Appeals Review Board of Civil Service Commission, and thus had not completely exhausted his administrative remedies.

Summary of Argument

I. A. Prior to the adoption, in 1972, of section 717 of Title VII, which gave federal employees the same right to sue under Title VII enjoyed by private employees, federal jurisdiction to remedy federal employment discrimination already existed under several other statutes.

1. The 1866 Civil Rights Act, 42 U.S.C. § 1981, prohibits all forms of employment discrimination, including discrimination by the federal government. This Court has already held that § 1982, which also derives from the 1866 Act, applies to the federal government, *District of Colum-*

bia v. *Carter*, 409 U.S. 418 (1973), and that § 1981 and § 1982 should be similarly construed. *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973). *Carter* and *Tillman* compel the conclusion that § 1981 applies to the federal government. Section 1343(4), 28 U.S.C., confers jurisdiction to enforce § 1981.

2. The Mandamus Act, 28 U.S.C. § 1361, authorizes the district courts to issue writs of mandamus to enforce the prohibition against federal employment discrimination contained in the Fifth Amendment, several statutes and executive orders, and the applicable regulations. Since federal officials have no discretion to discriminate against petitioner on the basis of race, their duty to act in a non-discriminatory manner is ministerial. Because discrimination is unlawful, the responsible officials are not protected by sovereign immunity. *Marbury* v. *Madison*, 5 U.S. 137 (1803). Although mandamus is not usually available to compel the payment of money, it is when there is ministerial duty to make a payment. The applicable regulations create such an absolute duty to make an award of back pay in any case of federal employment discrimination. 5 C.F.R. § 713.271(b).

3. The Tucker Act, 28 U.S.C. § 1346, confers jurisdiction on the district courts over actions against the United States founded upon the Constitution or any law or regulation. Section 1346 was amended in 1964 for the express purpose of permitting federal employees to sue for back pay. The similar language of 28 U.S.C. § 1491 has been construed by the Court of Claims to establish jurisdiction over federal employment discrimination actions. *Chambers* v. *United States*, 451 F.2d 1045 (Ct. Cl. 1971).

4. Jurisdiction over this action is also conferred by 28 U.S.C. § 1331 and the Administrative Procedure Act.

B. Section 717 did not repeal the remedies for federal employment discrimination which existed before 1972.

In construing section 717, the Court should look to the meaning and construction of Title VII as applied to private employees, since section 717 was adopted to give federal employees the same rights already enjoyed by private workers. This Court has already held that Title VII did not repeal the pre-existing remedies of private employees. *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975).

Section 717 does not expressly repeal the 1866 Civil Rights Act or any other remedy. Repeals by implication are not favored. Congress expressly rejected proposals to make Title VII the exclusive remedy for employment discrimination. In *Morton* v. *Mancari*, 417 U.S. 535 (1974), this Court held that the substantive provisions of section 717 did not repeal the apparently inconsistent preference for Indian employees in the Indian Reorganization Act of 1934. It follows, *a fortiori*, that section 717 did not repeal the existing complimentary remedies enforcing the same substantive prohibition against racial discrimination.

II. A. Exhaustion of administrative remedies should not be required of federal employees who bring employment discrimination actions under statutes other than Title VII. Exhaustion is not required of state or private employees who bring employment discrimination cases under the 1866 Civil Rights Act. *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975). Federal employees should not be treated differently. The administrative procedure established by the Civil Service Commission is merely one of several independent remedies among which employees may choose.

The traditional factors which militate in favor of an exhaustion requirement are not present in a federal em-

ployment discrimination case. Congress correctly concluded in 1972 that neither the Civil Service Commission nor the agencies have any expertise in employment discrimination matters. Since the finding of discrimination is mandatory on the establishment of certain facts, this is not an area where the agencies have any discretion to exercise. In July, 1975, the Civil Rights Commission concluded, as had Congress three years earlier, that the administrative procedure is so biased against aggrieved employees as to make resort thereto essentially futile. In Fiscal Year 1973, of 26,627 informal complaints and 2,743 formal complaints by federal employees, only 22 resulted in back pay or retroactive promotions.

If exhaustion were generally required, the federal courts would be obligated to determine (a) whether each particular complaint would have been futile in view of the many defects in the administrative procedure, and (b) whether an employee had chosen the correct administrative procedure among the 9 different procedures established by regulation. The judicial time consumed in deciding these questions would be better used resolving the merits of the discrimination claims. The delays and effort required to vigorously prosecute an administrative complaint place a significant burden on employees, and should not be imposed where there is little chance of success. Because of the great importance of eradicating discrimination, the most efficacious remedy should be the first invoked, and the choice of remedy should be made by the aggrieved employee, not by the courts.

B. Even if exhaustion is generally required in federal employment discrimination cases, further exhaustion efforts should not be required in this case. Although Civil Service Commission regulations require an agency to resolve a discrimination case within 180 days, the defendant agency

did not decide the instant case for 617 days. It would be unreasonable to impose on petitioner the further delay of an administrative appeal. Congress, in adopting section 717, made appeals to the Appeals Review Board optional because it concluded such appeals were generally futile. This Court should not require plaintiffs suing under statutes other than Title VII to meet a more stringent exhaustion requirement than Congress thought reasonable.

Should the Court conclude that petitioner's suit was premature, the appropriate disposition of this action is not dismissal with prejudice but merely an appropriate stay of judicial proceedings while exhaustion is completed. This is the usual practice in cases of inadequate exhaustion. If the government objects to this action because it claims petitioner's case should be considered by the Appeals Review Board, it must now afford petitioner an opportunity to appeal to the Board.

ARGUMENT

I.

Jurisdiction Over This Action Is Conferred By Statutes Adopted Prior To Section 717 of Title VII of The 1964 Civil Rights Act.

In 1971-72, when Congress was considering adopting section 717 or other legislation to assure federal employees a right to judicial determination of their claims of discrimination, both the Civil Service Commission and the Department of Justice advised Congress that federal employees already had that right. Irving Kator, the Deputy Executive Director of the Commission, testified:

> "There is also little question in our mind that a Federal employee who believes he has been discrim-

inated against may take his case to the Federal courts . . . ."[4]

The Commission submitted a written statement insisting:

"We believe Federal Employees now have the opportunity for court review of allegations of discrimination, and believe they should have such a right."[5]

The Commission argued that the then leading cases denying federal employees such a right to sue, *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970), and *Congress of Racial Equality* v. *Commissioner*, 270 F.Supp. 537 (D.Md. 1967), were incorrectly decided.[6] Assistant Attorney General Ruckelshaus assured a Senate subcommittee that the courts could remedy any unconstitutional or unlawful federal action.[7] Although

[4] Hearings Before Subcommittee of the Senate Committee on Labor & Public Welfare, 92 Cong., 1st Sess. 301 (1971) p. 296.

[5] *Id.* p. 310.

[6] The Commission reasoned: "As it appears that the attention of the court in the *CORE* case was not directed to the statute (5 U.S.C. § 7151) . . . and that case involved no constitutional issue, we do not regard it as dispositive of the matter under consideration. To the same effect see *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), in which one court found no jurisdiction to review an alleged failure of promotion due to discrimination but did not discuss the statutory or constitutional issues that might be involved in such an action. We are of the opinion that an individual who has exhausted the discrimination complaint procedure provided in Part 713 of the Civil Service regulations (5 CFR part 713) may obtain judicial review of the alleged discriminatory action . . ." Hearings Before the Subcommittee on Labor of the House Committee on Education and Labor, 32 Cong., 1st Sess. 386 (1971).

[7] Hearings Before a Subcommittee of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970), pp. 69, 74, 256-257:

"[T]o some extent injunctive remedies are already available. The constitutionality of any program can be challenged. The authority within the program of an official to act can be challenged."

"[T]here is no doubt that a court today may look into unauthorized or unconstitutional agency action . . ."

the Civil Service Commission insisted that section 717 "would add nothing"[8] to the rights federal employees already enjoyed under earlier statutes, Congress adopted section 717 in view of its concern that the courts might not construe the existing statutes to provide such a remedy.

Petitioner asserts that jurisdiction over his claims of federal employment discrimination is conferred by statutes adopted prior to section 717: the 1866 Civil Rights Act,[9] the Mandamus Act,[10] the Tucker Act,[11] the Administrative Procedure Act[12] and 28 U.S.C. §1331, and that the defendants' alleged refusal to promote him on account of race violates the Fifth Amendment, the 1866 Civil Rights Act, 5 U.S.C. §7151,[13] Executive Order 11478[14] and 5 C.F.R. part 713.[15] Petitioner urges that sovereign immunity pre-

[8] Hearings Before Subcommittee on Labor of the Senate Committee on Labor & Public Welfare, 92d Cong., 1st Sess. 301 (1971).

[9] 42 U.S.C. §1981.

[10] 28 U.S.C. §1361.

[11] 28 U.S.C. §1346.

[12] 5 U.S.C. §§702-06.

[13] 5 U.S.C. §7151 provides:

It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin. The President shall use his existing authority to carry out this policy.

[14] See n.39, *infra*, p. 23.

[15] See n.40, *infra*, p. 24.

sents no obstacle to injunctive relief requiring an end to discrimination, to injunctive relief to enforce the ministerial duty to award back pay in cases of discrimination, or to monetary relief against the defendant individuals. A waiver of sovereign immunity is necessary for awards of punitive and compensatory damages, and that waiver is found in the Tucker Act and the 1866 Civil Rights Act.

A. 1. *The 1866 Civil Rights Act*

Section 1981, 42 U.S.C., which derives from Section 1 of the 1866 Civil Rights Act, provides that "All persons within the jurisdiction of the United States shall have the same right in every state and Territory to *make and enforce contracts*. . . ." (Emphasis added). This includes employment contracts and thus entails a ban on racial discrimination in hiring and promotion. *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295, 301 (1975). Section 1981 has been uniformly held to bar discrimination in employment by state[16] and local[17] governments, by pri-

[16] See, *e.g. Johnson* v. *Cain*, 5 EPD ¶ 8509 (D. Del. 1973); *Suel* v. *Addington*, 465 F.2d 889 (9th Cir. 1972); *Strain* v. *Philpott*, 4 EPD ¶¶ 7885, 7562, 7521 (M.D. Ala. 1971); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974) (en banc); *London* v. *Florida Department of Health*, 313 F.Supp. 591 (N.D. Fla. 1970).

[17] See, *e.g.*, *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971); *Arrington* v. *Massachusetts Bay Transportation Authority*, 306 F.Supp. 1355 (D. Mass. 1969); *Glover* v. *Daniel*, 434 F.2d 617 (5th Cir., 1970); *Smiley* v. *City of Montgomery*, 350 F. Supp. 451 (M.D. Ala. 1972); *West* v. *Board of Education of Prince George's County*, 165 F.Supp. 382 (D. Md. 1958); *Mills* v. *Board of Education of Ann Arundel*, 30 F.Supp. (D. Md. 1938).

vate employers,[18] and by labor unions.[19] Jurisdiction over federal employment discrimination actions was expressly upheld under §1981 in *Bowers* v. *Campbell*, 505 F.2d 1155 (9th Cir. 1974).

The class of persons protected by section 1981 is described in the all encompassing language to be "[a]ll persons within the jurisdiction of the United States." Had Congress wished to limit the statute to exclude federal discrimination, it knew how. Section 1983, 42 U.S.C., expressly limits coverage action under color of the state law, as did a number of other post Civil War civil rights provisions. See, *e.g.*, 16 Stat. 140, §§1-3.[20]

[18] See, *e.g.*, *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Rice* v. *Chrysler Corp.*, 327 F.Supp. 80 (E.D. Mich. 1971); *Hackett* v. *McGuire Brothers Inc.*, 445 F.2d 442 (3d Cir. 1971); *Young* v. *International Tel & Tel. Co.*, 438 F.2d 737 (3d Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 93 S. Ct. 319 (1972); *Boudreau* v. *Baton Rouge Marine Contracting*, 437 F.2d 1011 (5th Cir. 1971); *Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 404 U.S. 998 (1970); *Brady* v. *Bristol Myers*, 452 F.2d 621 (8th Cir. 1972); *Bennett* v. *Gravelle*, 323 F.Supp. 203 (D. Md. 1971); *Copeland* v. *Mead Corp.*, 51 F.R.D. 266 (N.D. Ga. 1970); *Lazard* v. *Boeing Co.*, 322 F.Supp. 343 (E.D. La. 1971); *Long* v. *Ford Motor Co.*, 352 F.Supp. 135 (E.D. Mich. 1972); *Guerra* v. *Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex. 1972); *Jenkins* v. *General Motors Corp.*, 475 F.2d 764 (5th Cir. 1973).

[19] *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); *James* v. *Ogilvie*, 310 F.Supp. 661 (N.D. Ill. 1970); *Guerra* v. *Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex. 1972); *Johnson* v. *Goodyear Tire & Rubber Co.*, 349 F.Supp. 3 (S.D. Tex. 1972); *Jenkins* v. *General Motors Corp.*, 475 F.2d 764 (5th Cir. 1973).

[20] The criminal provisions of section 2 of the 1870 Civil Rights Act, 16 Stat. 140, apply only to conduct under color of *state* law; the criminal provisions of the 1866 Act apply to conduct under color of *any* law. 14 Stat. 27. See n.22, *infra*, p. 17.

That section 1981 prohibits federal discrimination is compelled by *District of Columbia* v. *Carter*, 409 U.S. 418 (1973) and *Tillman* v. *Wheaton Haven Recreation Asso.*, 410 U.S. 431 (1973). Section 1981 was originally enacted as part of Section 1 of the 1866 Civil Rights Act, 14 Stat. 27. Section 1 of that Act protected, not only the rights now covered in §1981, including the right to contract, but also the right to buy and own real property. Manifestly if any one of the rights covered by section 1 was protected against federal discrimination, all must have been, for the enumeration of rights draws no distinction among them. Subsequent to 1866, section 1 of the Civil Rights Act was divided into two sections; the provisions regarding real property were placed in 42 U.S.C. §1982,[21] and the other provisions in §1981. This restructuring, however, involved no change in substance. The scope of §1981 and §1982 are necessarily the same. In *Tillman* v. *Wheaton Haven Recreation Asso.*, 410 U.S. 431 (1973), the Court held:

> The operative language of both §1981 and §1982 is traceable to the Act of April 9, 1866, c.31, 1, 14 Stat. 27. *Hurd* v. *Hodge*, 334 U.S. 24, 30-31 (1948). In light of the historical interrelationship between §1981 and §1982, we see no reason to construe these sections differently . . .

410 U.S. at 439-40. Since the Court had concluded that §1982 covered discrimination by private clubs, it held that §1981 did as well.

Hurd v. *Hodge*, 334 U.S. 24 (1948), and *District of Columbia* v. *Carter*, 409 U.S. 418 (1973), hold that section 1982 applies to discrimination by the federal government.

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[21] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

That provision bars

> all such discrimination, private as well as public, *federal as well as state. Jones* v. *Alfred H. Mayer & Co.*, *supra*, at 413. With this in mind, it would be anomalous indeed if Congress chose to carve out the District of Columbia as the sole exception to an act of otherwise universal application. And this is all the more true where, as here, the legislative purposes underlying §1982 support its applicability in the District. The dangers of private discrimination, for example, that provided a focal point of Congress' concern in enacting the legislation, were and are, as present in the District of Columbia as in the States, and the same considerations that led Congress to extend the prohibitions of §1982 *to the Federal Government* apply with equal force to the District, which is a mere instrumentality of that Government. 409 U.S. at 422.[22] (Emphasis added).

The reasoning of *Carter* is fully applicable to §1981;[23] since §1982 applies to the Federal government, §1981 does so as well.

The legislative background of the 1866 Civil Rights demonstrates the correctness of *Carter*, *Hodge* and *Tillman*, and gives no reason to believe that Congress would have intended to deny to newly freed slaves protection from discrimination by federal officials.[24] It is unlikely that Con-

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[22] See also *Screws* v. *United States*, 325 U.S. 91, 97, n.2 (1945) (§2 of the 1866 Act, rendering criminal certain discrimination against "any inhabitant of any State, Territory or District," applies to federal officials).

[23] *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), found "unthinkable" the suggestion that while the states were prohibited from discriminating in education the federal government was not. On the extent and nature of racial discrimination in federal service, see *Morton* v. *Mancari*, 417 U.S. 535, 545 n.22 (1974).

[24] The abolitionists in control of Congress in 1866 had for a generation been anxious to abolish slavery and all its trappings

gress, having forbidden slavery throughout the nation, intended by section 1 of the Civil Rights Act to abolish the "badges of slavery" only in the states and to leave them intact in the nation's capitol. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).[25] The memory of the mistreatment of blacks by federal officials under the Fugitive Slave Act was still fresh in the minds of abolitionists in 1866.[26] Freedmen's Bureau agents were reported to be more sympathetic to the desires of white Southern planters than the needs of freedmen.[27] By April of 1866, Congress was aware of President Johnson's opposition to its reconstruction program, and believed that he was actively undermining enforcement of new legislation and dismissing federal officers who supported Congress' policies.[28] That concern about the conduct of federal offi-

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in the District of Columbia. Henry B. Stanton, in an address to the Massachusetts legislative urging abolition in the District of Columbia, had argued: "[H]aving robbed the slave of himself, and thus made him a thing, Congress is consistent in denying to him all the protection of the law as a man. His labor is coerced from him by laws of Congress: No bargain is made, no wage is given . . . There is not the shadow of legal protection for the family state among the slaves of the District . . . No slave can be a party before a judicial tribunal, . . . in any species of action against any person, no matter how atrocious may have been the injury received. He is not known to the law as a person: much less, a person with civil rights . . . Congress should immediately restore to every slave, the ownership of his own body, mind and soul, transfer them from things without rights, to men with rights . . . the slave himself should be legally protected in life and limb, in his earnings, his family and social relations, and his conscience." ten Broek, Equal Under Law, p. 46, 41-57 (1951).

[25] Congress also had ample reason for concern that the federal officials of the Freedmen's Bureau, established in 1865, were seriously mistreating and exploiting the newly freed black former slaves. G. Bentley, History of the Freedmen's Bureau, 77, 84, 125-132 (1955).

[26] See J. Ten Broek, Equal Under Law, 57-65 (1951); *Ableman* v. *Booth*, 21 How. (62 U.S.) 506 (1858).

[27] See *e.g.* K. Stamp, The Era of Reconstuction, 133-34 (1965).

[28] See M. King, Lyman Trumbull, 293-95 (1965).

cials is manifest in other provisions of the 1866 Civil Rights Act, which compels federal marshalls, on pain of criminal punishment, to enforce the Act,[29] expressly requires that the district attorneys and other officials be paid for enforcing the Act at the usual rates,[30] and authorized the circuit courts, rather than the President, to appoint commissioners with the power to arrest and imprison persons violating the Act.

The 1866 Civil Rights Act, in addition to forbidding employment discrimination in section 1, expressly provided a judicial remedy:

> [T]he district courts of the United States, within their respective districts, shall have . . . cognizance . . . concurrently within the circuit courts of the United States, of all cases, civil and criminal, affecting persons who are denied . . . any of the rights secured to them by the first section of this act . . .

14 Stat. 27. This provision is now incorporated in 28 U.S.C. §1343(4).[31]

It is particularly unlikely that the Congress which enacted the 1866 Civil Rights Act could have intended that, to the extent that federal officials violated its provisions,

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[29] 14 Stat. 28, §5.

[30] 14 Stat. 29, §7.

[31] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

See *Hague* v. *C.I.O.*, 307 U.S. 496, 508, n.10 (1939).

aggrieved citizens would have no legal remedy.[32] The abolitionists who finally won control of the Congress in the 1860's and 1870's had long maintained that the rights described in Reconstruction Amendments, and legislation were not new, but already existed by virtue of the privileges and immunities clause and the Bill of Rights.[33] The purpose of such Amendments and legislation was, above all, to make those rights *enforceable*. The 1866 Civil Rights Act was entitled "An Act to protect all Persons in the United States in the Civil Rights, and *Furnish the Means of their Vindication*." 14 Stat. 27 (emphasis added) Congressman Wilson, speaking in favor of the 1866 Civil Rights Bill, explained:

> Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of Civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to stature form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. Cong. Globe, 39th Cong. 1st Sess. 1117.

[32] If Congress had wanted to limit jurisdiction to discrimination involving state action, it knew how to do so. Sections 2 and 3 of the 1870 Civil Rights Act and section 1 of the 1871 Civil Rights Act expressly restrict their coverage to action taken under color of state law, as does 28 U.S.C. §1343(3). No such limitation is to be found in section 2 of the 1866 Act or section 1343(4), and its absence must be taken as revealing Congressional intent to do just what those provisions said—confer jurisdiction over *all* violation of §1981, regardless of whether the violation may be by state officials, federal officials, or private parties.

[33] See generally ten Broek, Equal Under Law (1951); Graham, "The Early Anti-Slavery Backgrounds of the Fourteenth Amendment," 1950 Wisc. L. Rev. 479; Graham, "The Conspiracy Theory of the Fourteenth Amendment," 47 Yale L.J. 371 (1938).

Since federal discrimination was already forbidden by the Fifth Amendment, to hold the 1866 Civil Rights Act unenforceable against federal defendants would be to render the Act, in this regard, nugatory.

Section 1981 entails in certain instances[34] a waiver of sovereign immunity. The Congress which enacted section 1981 had no fondness for sovereign immunity, and could not have contemplated that ex-slaves aggrieved by federal misconduct would have to seek a remedy through a private bill.[35] This Court has already made clear that it will not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Trading* v. *United States*, 350 U.S. 61, 69 (1955), or "whittle down . . . by refinements" a statute affecting sovereign immunity.

[34] No sovereign immunity would be involved in an action for injunctive relief or to enforce the regulation requiring back pay. See pp. 32-35, *infra*. Section 1981, in conjunction with §1343(4), covers ordinary damages and certain other appropriate relief.

[35] That Congress, only three years earlier, led by many of the prominent abolitionists, had enacted the first comprehensive waiver of federal immunity in an attempt to end the long standing practice of seeking redress from Congress through private bills. President Lincoln, in his first State of the Union message, had urged such abolition:

> It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. *The investigation and adjudication of claims in their nature belong to the judicial department.*

Schlesinger and Israel, The State of the Union Messages of the President, v. 2, 1060 (1966) (Emphasis added). The legislation waiving that immunity was enacted largely to end the practice of redressing grievances through private bills, which left many citizens without a remedy, fostered lobbyists pressing dubious claims, and corrupted the Congress. See Cong. Globe, 38th Cong., 1st Sess. 1674-75.

United States v. *Yellow Cab Co.*, 340 U.S. 543, 550 (1950).[36] On the contrary, precisely because that immunity "gives the government a privileged position, it has been appropriately confined," *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1938), and any authority to sue "is to be liberally construed." *United States* v. *Shaw*, 309 U.S. 495, 502 (1939). When Congress establishes by statute a legal right, including a right against the federal government, it must be deemed enforceable by the courts unless there is an unequivocal congressional intent to the contrary.[37]

2. *The Mandamus Act*

Section 1361, 28 U.S.C., provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

This provision, enacted in 1962, was intended to confer upon the district courts the mandamus power until then limited to the District Court for the District of Columbia. *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970); *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F.2d 686 (8th Cir. 1967), *cert. denied*, 387 U.S. 945. A writ of mandamus is available to compel a federal officer to perform any ministerial act, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), regardless of whether the official's obligation arises under the Constitution, a federal statute,

[36] See also *Rayonier* v. *United States*, 352 U.S. 315, 320 (1957).

[37] *Minnesota* v. *United States*, 305 U.S. 382, 388, n.5 (1939); *United States* v. *Hellard*, 322 U.S. 363 (1944); *United States* v. *Jones*, 109 U.S. 513 (1883), 519-521.

a regulation or an Executive Order. *Leonhard* v. *Mitchell*, 473 F.2d 709, 713 (2d Cir. 1973).

The defendant officials clearly have such a ministerial duty to make promotions without discrimination on the basis of race. The Fifth Amendment guarantee of due process of law absolutely prohibits the federal government from discriminating against blacks in employment, education, or any other regard. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).[38] The authority of the defendants in personnel matters is strictly circumscribed by section 7151 of Title 5 of the United States Code, which declares it to be the official policy of the United States "to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin," and directs that the President shall carry out this policy.[39] Of course, racial discrimination by defendants is also forbidden by the Civil Rights Act of 1866, 42 U.S.C. §1981,

[38] "[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race." 347 U.S. at 499, quoting *Gibson* v. *Mississippi*, 162 U.S. 595, 591 (1866). The Senate Report on the 1972 amendments to Title VII concluded on the basis of *Bolling* that "[t]he prohibition against discrimination by the Federal government, based upon the Due Process clause of the Fifth Amendment, was judicially recognized long before the enactment of the Civil Rights Act of 1964." S.Rep. No. 92-415, 92nd Cong., 1st Sess. (1971) 13. The Fifth Amendment has been expressly held to bar federal discrimination in employment *Davis* v. *Washington*, 352 F.Supp. 187 (D.D.C. 1972) *aff'd*, 512 F.2d 956 (D.C. Cir. 1975), *petition for writ of certiorari pending*, No. 74-1492; *Faruki* v. *Rogers*, 349 F.Supp. 723 (D.D.C. 1972) (three judge district court).

[39] Section 7151 is no mere assertion of social goals; it is a direct and unequivocal command to the executive branch not to discriminate against petitioner because of his race. See *Henderson* v. *Defense Contract Administration*, 370 F.Supp. 180 (S.D.N.Y. 1973); *Morton* v. *Mancari*, 417 U.S. 535, 546 n.21 (1974).

infra, pp. 14-19, and by federal regulations and Executive Orders.[40]

The lower courts have held that mandamus is available to compel federal defendants to hire and promote without regard to race. *Beale* v. *Blount*, 461 F.2d 1133 (5th Cir. 1972); *Penn* v. *Schlesinger*, 490 F.2d 700, 704-05 (5th Cir. 1973), *reversed on other grounds*, 497 F.2d 970 (5th Cir. 1974); *Thorn* v. *Richardson*, 4 EPD ¶ 7630, at p. 5490 (W.D. Wash. 1971). At least since *Service* v. *Dulles*, 354 U.S. 363 (1957), this Court has recognized that federal personnel decisions are subject to judicial scrutiny. *Sampson* v. *Murray*, 415 U.S. 61, 71 (1974).

Mandamus is also available to enforce a ministerial duty to pay a particular sum of money to the plaintiff,[41] though

[40] Part 713, 5 C.F.R., implements, *inter alia*, a series of Executive Orders dating back to 1948. See E.O. 9980, July 26, 1948; E.O. 10590, January 18, 1955; E.O. 10925, March 6, 1961; E.O. 11246, September 24, 1965; E.O. 11478, August 8, 1969; E.O. 11590. Both part 713 and Executive Order 11478 establish that it is the policy of the government of the United States "to provide equal opportunity in federal employment for all persons, to prohibit discrimination in employment because of race," E.O. 11478, §1; 5 C.F.R. §713.202; and both provide that each executive department and agency "shall establish a program to assure equal opportunity in employment and personnel operations without regard to race." E.O. 11478, §2; C.F.R. Part 713.201(a).

[41] In *United States ex rel. Parish* v. *MacVeagh*, 214 U.S. 124 (1909), the Secretary of the Treasury had refused to pay the plaintiff $181,358.95, which payment was required by a special Act of Congress. This Court held that mandamus was available to compel the Secretary to issue a draft in that amount. 214 U.S. at 138. In *Miguel* v. *McCarl*, 291 U.S. 442 (1934), this Court held that mandamus was available to compel the payment of a pension unlawfully withheld by the Comptroller General and the Army Chief of Finance. In *Roberts* v. *United States ex rel. Valentine*, 176 U.S. 221 (1900), this Court upheld a writ of mandamus directing the Treasurer of the United States to pay interest on certain bonds issued by the District of Columbia. See also *Garfield* v. *United States ex rel. Goldsby*, 211 U.S. 249 (1908); *Work* v. *United States ex rel. Lynn*, 266 U.S. 161 (1924); *City of New York* v. *Ruckelshaus*, 358 F.Supp. 669 (D. D.C. 1973).

not to compel payment in an ordinary disputed tort or contract action. In the instant action plaintiff seeks, *inter alia*, an award of back pay. Were this a mere claim for consequential damages mandamus would be inappropriate. But the applicable regulations place upon defendants an express obligation to compute and award back pay in cases of racial discrimination, rendering the award of such back pay ministerial.[42] The mandatory nature of back pay awards under the regulation is somewhat more favorable to employees than the standard applied by courts in Title VII litigation, which involves a limited degree of discretion. *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880 (1975). If the district court finds discrimination, the defendants will have an absolute obligation to provide back pay, and that court can compel performance of that ministerial act by a writ of mandamus.[43]

[42] Section 713.271(b), 5 C.F.R., provides:

> *Remedial action involving an employee.* When an agency or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency *shall* take remedial actions which *shall* include one or more of the following, but need not be limited to these actions:
>
> Retroactive promotion, with back pay computed in the same manner prescribed by §550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but in any event, not to exceed the date he would have been promoted. (Emphasis added)

[43] The decisions of the Fifth Circuit in this regard may be divided. The panel in *Beale* held that back pay was awardable along with reinstatement in an appropriate case. 461 F.2d 1133, 1138. The original panel in *Penn* concluded that back pay was unavailable because it would "impinge upon the Treasury." 490 F.2d 700, 704-5, but the Fifth Circuit *en banc* adopted the decision of Judge Godbold which appears to permit back pay awards because of §713.271(b), 490 F.2d 700, 713-14; 497 F.2d 970.

Sovereign immunity is no obstacle to the award of relief by writ of mandamus. That defense to a mandamus action was raised and rejected long ago in *Marbury* v. *Madison*, 5 U.S. (1 Cranch), 137, 166, 170-171 (1803).[44] In addition to sanctioning mandamus actions against federal officials, section 1361 also authorizes mandamus against "any agency" of the United States, including in this case the defendant General Services Administration.[45] Certainly section 1361 constitutes a waiver of immunity in any action "in the nature of mandamus;" if it did not that provision would be a dead letter.

3. *The Tucker Act*

Section 1346, Title 28 United States Code, provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> • • •

[44] See *Clackamas County, Oregon* v. *McKay*, 219 F.2d 479, 488-496 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955); *McQueary* v. *Laird*, 449 F.2d 608, 611 (10th Cir. 1971); Byse and Fiucca, "Section 1361 of the Mandamus and Venue Act of 1962" 81 Harv. L. Rev. 308, 340-42 (1967).

[45] That section 1361 authorized mandamus against an agency was well understood. Senator Mansfield, explaining the bill on behalf of the Judiciary Committee, stated that under it the court can only compel "the official or *agency* to act where there is a duty which the committee construes as an obligation, to act . . . As stated in the House report, the bill does not define the term 'agency,' but the committee agrees that it should be taken to mean any department, independent establishment, commission, administration, authority, board, or bureau of the United States, or any corporation in which the United States has a proprietary interest." 108 Cong. Rec. 18784. (Emphasis added)

> (2) Any other civil action or claim against the United States, not exceeding $10,000[46] in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

This statute, known as the Tucker Act, is an express waiver of sovereign immunity as to claims within its scope,[47] and thus covers punitive and compensatory damages as well as back pay.

[46] The original Complaint contained no allegation as to the size of plaintiff's claim. The proposed Amended Complaint alleges that the amount "in controversy" exceeds $10,000, (A. 61a) but the United States denied that such an amount was at stake. Defendant's Memorandum In Opposition to Plaintiff's Motion to Amend, p. 4. If this Court were to determine that jurisdiction to award back pay and damages existed only under section 1346, plaintiffs would be entitled to waive recovery in excess of $10,000 and thus confer jurisdiction on the district court, and would do so. See *Perry* v. *United States*, 308 F.Supp. 245 (D.Colo. 1970), *aff'd* 442 F.2d (10th Cir. 1971); *Sutcliffe Storage & Warehouse Co.* v. *United States*, 162 F.2d 849 (1st Cir. 1947); *United States* v. *Johnson*, 153 F.2d 846 (9th Cir. 1946); *Hill* v. *United States*, 40 Fed. 441 (C.C. Mass. 1889); *Jones* v. *United States*, 127 F.Supp. 31 (E.D.N.C. 1954).

The standards for computing jurisdictional amounts under §1331 and §1346 are not the same, for §1331 alone authorizes injunctive relief. Thus, where the prospective value of the injunctive relief exceeded $10,000, but the monetary award was less than $10,000, jurisdiction would exist under both provisions. The same would be true where the combined value of the monetary and injunctive relief exceeded $10,000, or involved fundamental civil liberties of priceless value, so long as the dollar amount sought did not exceed $10,000. See 1 Moore's Federal Practice ¶ 0.96.

[47] *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); *Spillway Marina, Inc.* v. *U.S.*, 445 F.2d 876 (10th Cir. 1971); *Lloyds' London* v. *Blair*, 262 F.2d 211 (10th Cir. 1958); *Union Trust Co.* v. *United States*, 113 F.Supp. 80 (D.D.C. 1953), *aff'd in part*, 221 F.2d 62, *cert. denied*, 350 U.S. 911.

Petitioner's claims clearly fall within the literal language of section 1346. Racial discrimination in federal employment is prohibited by the Fifth Amendment to the Constitution and by several statutes. See, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). An action is "founded upon" the Constitution whenever the damages are alleged to result from a violation of the Constitution; the plaintiff need not prove the Constitution expressly authorizes a lawsuit for that particular type of violation, since the Constitution itself contains no express authorization of litigation for violation of any of its provisions.[48] Similarly, an action is "founded upon" a federal statute if the government action complained of is a violation of that statute, regardless of whether the statute itself creates or contemplates a cause of action.[49] The lower courts have unanimously rejected the argument that an action under the Tucker Act can only be "founded upon" a federal statute which itself creates a remedy or

[48] See *Smith* v. *United States*, 458 F.2d 1231 (9th Cir. 1972) (Fifth Amendment); *United States* v. *Hvoslef*, 237 U.S. 1 (1915) (Article I, Section 9); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (Fourth Amendment).

[49] Section 1346(a)(2) has long been construed to authorize actions to compel a refund of fines or penalties, on the ground that the propriety of the fine or penalty was governed by a federal statute. See *Carriso* v. *United States*, 106 F.2d 707 (9th Cir. 1939); *Compagnie General Transatlantique* v. *United States*, 21 F.2d 465 (S.D. N.Y. 1927), aff'd, 26 F.2d 195. *Spanish Royal Mail Line Agency, Inc.* v. *United States*, 45 F.2d 404 (S.D. N.Y. 1930); *Sinclair Nav. Co.* v. *United States*, 32 F.2d 90 (5th Cir. 1929); *Sultzbach Clothing Co.* v. *United States*, 10 F.2d 363 (W.D. N.Y. 1925); *Law* v. *United States*, 18 F.Supp. 42 (D. Mass. 1937); *Lancashire Shipping Co.* v. *United States*, 4 F.Supp. 544 (S.D. N.Y. 1933). Litigation under §1346 has been expressly sanctioned as "founded upon" a wide variety of other statutes which set the standard for government conduct, but contained no mention of any remedy. See, *e.g.*, *Beers* v. *Federal Security Administrator*, 172 F.2d 34 (2nd Cir. 1949) (Social Security Act); *Ross Packing Co.* v. *United States*, 42 F. Supp. 932 (E.D. Wash. 1942) (National Labor Relations Act); *Alcoa S.S. Co.* v. *United States*, 80 F. Supp. 158 (S.D. N.Y. 1948) (Transportation Act).

right of action.[50] In *United States* v. *Emery, Bird, Thayer R.R. Co.*, 237 U.S. 28 (1915), this Court held that an action to recover a tax was "founded upon" the Corporation Tax Law under which the tax was collected, although that tax provision contained no remedial provision. 237 U.S. at 31-32.[51]

Section 1346 covers "any claim" arising under the Constitution, statutes or regulations, and, while there are express exceptions,[52] they are not applicable to this case. See *Brooks* v. *United States*, 337 U.S. 49, 51 (1949). This construction of §1346 is supported by the interpretation given by the Court of Claims to the similarly worded provisions of 28 U.S.C. §1491. *Chambers* v. *United States*, 451 F.2d 1045 (Ct. Cl. 1971); *Allison* v. *United States*, 451

[50] *Aycock-Lindsey Corporation* v. *United States*, 171 F.2d 518 (5th Cir. 1948); *Compagnie General Transatlantique* v. *United States*, 21 F.2d 465 (S.D. N.Y. 1927); *Ross Packing Co.* v. *United States*, 42 F. Supp. 932, 937 (E.D. Wash. 1942).

[51] This action also arises under the Executive Order and regulation forbidding discrimination in federal employment. 5 C.F.R. §713; Executive Order 11478. In *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 984, the court concluded that no action under the Tucker Act could be had to enforce the order and regulation on the ground that neither mentioned money claims, and "none of the executive orders or regulations . . . purports to confer any right on an employee of the United States to institute a civil action for damages against the United States." 415 F.2d at 1278. This reasoning is not correct. First, since the decision in *Gnotta* the regulations have been amended to authorize the award of back pay. Second, no mere regulation or Executive Order *could*, by itself, create a federal cause of action; only Congress has that power. Third, the reasoning in *Gnotta*—that an action can only be "founded upon" a regulation which itself creates a cause of action—is precisely the construction of the Tucker Act consistently rejected by all other federal courts.

[52] Section (d) provides: "The district courts shall not have jurisdiction under this section of any civil action or claim for a pension."

F.2d 1035 (Ct. Cl. 1971); *Pettit* v. *United States*, 488 F.2d 1026 (Ct. Cl. 1973). The decisions of the Court of Claims construing its own jurisdiction must be afforded substantial weight. See *Beale* v. *Blount*, 461 F.2d 1133, 1135 n.2 (5th Cir. 1972).

That back pay is available under the Tucker Act is made abundantly clear by its legislative history. Prior to 1964, §1346 expressly excluded from its coverage "[a]ny civil action or claim to recover fees, salary or compensation for official services of officers or employees of the United States." See, 28 U.S.C.A. §1346(d)(2) (1962). This exception was understood to preclude the award of back pay. *Jackson* v. *United States*, 129 F.Supp. 537 (D. Utah 1955). In 1964 this restrictive provision of Section 1346 was repealed. Pub. L. 88-519, 78 Stat. 699. The House Report,[53] the Senate Report,[54] and the congressional de-

[53] H. Rep. 1604, 88th Cong., 2d Sess., p. 2:

"The committee notes that by virtue of the act of October 5, 1962 (76 Stat. 744, 28 U.S. §1361), it is now possible for Government Employees who claim to have been improperly discharged to sue in their home districts for reinstatement. However, the present prohibition of subsection (d)(2) of section 1346, 28 United States Code makes it necessary for any claim for back pay to be brought in the Court of Claims. The committee believes that when the amount claimed as back pay is not more than $10,000, and is therefore within the monetary lin.it of the district courts' general jurisdiction of contract claims against the United States the issue of reinstatement and the issue of compensation should be susceptible of being disposed of in a single action."

[54] S.Rep. 1390, 88th Cong., 1st Sess., 2 U.S. Code Cong. and Admin. News (1964), p. 3255:

"Under the existing statutes, any officer or employee of the United States is required to file only in the Court of Claims here in Washington a civil suit to recover fees, salary, or compensation for services rendered as an officer or employee of the United States. By virtue of the act of October 5, 1962

bates[55] all agreed that the primary purpose of the change was to allow actions for back pay in the district courts.[56]

4. *28 U.S.C. § 1331*

Section 1331, 28 U.S.C., confers jurisdiction on the district courts in any action in which the sum in controversy

(76 Stat. 744, 28 U.S.C. 1361), it is now possible for Government employees who allege they have been improperly discharged to sue in their home districts for reinstatement, but under the prohibition of subsection (d) of 28 U.S.C., Section 1346, the employee's claim for back pay, which very frequently accompanies his claim for reinstatement, must be brought in the Court of Claims. Under the circumstances it is clear, that in order to do complete justice as efficiently and inexpensively as possible, the district courts should be given jurisdiction of the compensation claimed as well as the improper discharge, in order that they may be disposed of in a single action."

[55] 110 Cong. Rec. 19766 (Remarks of Sen. Keating):

"This bill will have its most salutary effect in employee discharge cases. Today, under a 1962 statute, a Government employee who claims to have been improperly removed from his position may sue to get his job back in his local federal court. But the subsection of the Judicial Code which the present bill would repeal today prevents the employee, if he succeeds in establishing his right to reinstatement from getting a judgment in the same action for the backpay to which he is also entitled. To get the back pay, he must either bring another suit in the Court of Claims or, in some instances, seek the additional relied administratively. Now, if this bill is finally approved, it will be possible for him to secure both reinstatement and complete monetary relief in single proceeding."

[56] Injunctive relief is not available under the Tucker Act. See *Clay* v. *United States*, 210 F.2d 686 (D.C. Cir. 1954); *Rambo* v. *United States*, 145 F.2d 670 (5th Cir. 1944), *cert. denied*, 324 U.S. 848; *Blanc* v. *United States*, 244 F.2d 708 (2d Cir. 1957).

District court jurisdiction under the Tucker Act to award back pay for employment discrimination was expressly upheld in *Palmer* v. *Rogers*, 6 EPD ¶8822, p. 5493 n. 1 (D.D.C. 1973).

exceeds $10,000[57] and which "arises under the Constitution, laws or treaties of the United States." The term "laws" is not limited to statutes, but includes any regulation or Executive Order with the force of law.[58]

Section 1331 thus confers jurisdiction over the individual defendants in this federal employment discrimination action[59] unless those individuals are protected from suit by the sovereign immunity of the federal government. At least since *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803) it has been clear that federal employees who act in excess of their authority or in violation of the Constitution enjoy no such immunity. This Court expressly rejected the suggestion that the Secretary of State could not be sued because he was a federal official:

> It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety . . . of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.
>
> But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular

[57] Regarding the allegation of jurisdictional amount, see n. 46, *supra,* p. 27.

[58] *Murphy* v. *Colonial Fed. Savings and Loan,* 388 F.2d 609 (2d Cir. 1967); *Farmer* v. *Philadelphia Elec. Co.,* 329 F.2d 3 (3d Cir. 1964).

[59] Several lower courts have sustained jurisdiction on this basis. See *e.g., Palmer* v. *Rogers,* 6 EPD ¶ 8822, p. 5493 (D. D.C. 1973); *Cortwright* v. *Resor,* 325 F.Supp. 797, 808 (E.D. N.Y. 1971).

> direction of the President and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

5 U.S. at 168.

The similar question of whether state sovereign immunity and the Eleventh Amendment bar a federal action against state officials has been similarly answered. In *Ex Parte Young,* 209 U.S. 123 (1908), the Attorney General of Minnesota urged the action was in effect one against the state, and thus barred by the Eleventh Amendment. This Court rejected this contention, and held that state officials could be enjoined from taking actions which would violate the Constitution:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into

> conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

209 U.S. at 159-160. The limitation on the immunity of state officers delineated in *Ex Parte Young* is the same limitation applicable to federal officials. *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 621 (1912). See also *Dugan* v. *Rank*, 372 U.S. 609, 621-624 (1963); *Malone* v. *Baldwin*, 369 U.S. 643 (1962); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 643 (1949).

If the action at issue is unlawful, it may be enjoined even though the activity may involve a large number of federal employees, substantial sums of money, or policies supported by high public officials. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). These cases were properly deemed suits against individuals rather than against the United States, not because the issues were unimportant, or the relief in some metaphysical sense "negative" rather than "affirmative", but because, since the activity challenged was unconstitutional, such activity was *ipso facto* not that of the sovereign.[60]

If, as alleged, the individual defendants did deny plaintiff promotions because of his race, they did so—not as agents of the United States cloaked with its immunity—but as private individuals on an unlawful and invidious

[60] The lower courts have consistently rejected out of hand contentions by the United States that its officers were protected by sovereign immunity when they act in violation of the Constitution or in excess of their statutory authority. *Wasson* v. *Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Toilet Goods Association* v. *Gardner*, 360 F.2d 677, 683, n. 6 (2d Cir. 1966) *aff'd*, 387 U.S. 158 (1967); *Berk* v. *Laird*, 429 F.2d 302, 306 (2d Cir. 1970).

enterprise of their own, and it is those individuals, not the plaintiff, who are interfering with the administration of official government policy. *Settle* v. *E.E.O.C.*, 345 F.Supp. 405 (S.D. Tex. 1972). Were this an action alleging racial discrimination in employment by a state, a defense of sovereign immunity would necessarily fail, for the Constitution places upon the states a legally enforceable obligation to hire and promote employees without discriminating on the basis of race.[61] "[I]t would be unthinkable that the same Constitution would impose a lesser duty on the federal Government." *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954).[62]

Insofar as a complaint seeks damages against the individual defendants, it clearly states a cause of action under §1331. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 398 (1971). Government officials have no "executive immunity" from liability for injury caused by a bad faith act of discrimination in violation of federal law. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

[61] State officials practicing discrimination in employment have been repeatedly held to lack sovereign immunity. *Board of Trustees of Arkansas A & M College* v. *Davis*, 396 F.2d 730, 732 (8th Cir. 1968); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971). Federal courts have consistently taken jurisdiction over litigation against state agencies and officials to resolve allegations of racial discrimination in hiring or promotion. See, e.g. *Carter* v. *Gallagher, supra; Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *N.A.A.C.P.* v. *Allen*, 340 F.Supp. 703 (M.D. Ala. 1972); *Johnson* v. *Cain*, 5 EPD ¶8509 (D. Del. 1973); *Suel* v. *Addington*, 465 F.2d 889 (9th Cir. 1972); *Bennett* v. *Gravelle*, 4 EPD ¶7566 (4th Cir. 1971); *Strain* v. *Philpott*, 4 EPD ¶¶7885, 7562, 7521 (M.D. Ala. 1971); *Morrow* v. *Crisler*, 479 F.2d 960, *modified on rehearing en banc*, 491 F.2d 1053 (5th Cir. 1974); *London* v. *Florida Department of Health*, 313 F.Supp. 591 (N.D. Fla. 1970), *aff'd*, 448 F.2d 655 (5th Cir. 1971).

[62] See also *Watkins* v. *Washington*, 3 EPD ¶8291, p. 6988 (D. D.C. 1971).

5. *Administrative Procedure Act*

Section 10(a) of the Administrative Procedure Act, 5 U.S.C. §702, provides in broad language that "[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The instant action is within the literal language of the Administrative Procedure Act. Plaintiff is undeniably aggrieved by the refusal of the defendants to promote him. A refusal to promote plaintiff because of his race would be contrary to law,[63] arbitrary, capricious and in violation of his rights under the Fifth Amendment to the Constitution. 5 U.S.C. §706. The coverage of the Administrative Procedure Act is to be liberally interpreted.[64] The Administrative Procedure Act itself confers jurisdiction on the district court. *Rusk* v. *Cort*, 369 U.S. 367, 370, 372 (1962).[65] The "legal right" which plaintiff seeks to enforce need not be contained in a statute which

[63] "Law" clearly includes regulations. See e.g. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 417 ff. (1971).

[64] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967).

[65] Justice Brennan, concurring, concluded that the Administrative Procedure Act was a general grant of jurisdiction. 369 U.S. at 380, n. 1. Justice Harlan dissented on the ground that jurisdiction had been withdrawn by the Immigration and Nationality Act of 1952, but agreed that otherwise it would have been conferred by the Administrative Procedure Act. See 369 U.S. at 383-399.

See also *Citizens Committee for Hudson Valley* v. *Volpe*, 425 F.2d 97, 102-103 (2d Cir. 1970) cert. denied 400 U.S. 949 (1970); *Cappadora* v. *Celebrezze*, 356 F.2d 1, 5-6 (2d Cir. 1966); *Schicker* v. *United States*, 346 F.Supp. 417, 419 (D. Conn. 1972) modified on other grounds sub nom., *Schicker* v. *Romney*, 474 F.2d 309 (2d Cir. 1973); *Road Review League* v. *Boyd*, 270 F.Supp. 650, 651 (S.D.N.Y. 1967); *Harris* v. *Kaine*, 352 F.Supp. 769, 772 (S.D.N.Y. 1972); *Davis* v. *Romney*, 355 F.Supp. 29, 40-42 (E.D. Pa. 1973); *Northeast Residents Association* v. *Department of Housing and Urban Development*, 325 F.Supp. 65, 67 (E.D. Wisc. 1971); *Arrow Meat Company* v. *Freeman*, 261 F.Supp. 622, 623 (D. Ore. 1966).

establishes an independent basis of jurisdiction; it is sufficient that the statute was enacted to protect plaintiff's interests. *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 933 (2d Cir. 1968). The Act waives any immunity of the agencies whose conduct is subject to review.[66]

The Constitution, Acts of Congress, an Executive Order and federal regulations all strip the defendants of any discretion to discriminate, and this is not an area in which the agencies or Civil Service Commission have significant expertise.[67] Jurisdiction[68] is thus clearly appropriate under the Administrative Procedure Act.

[66] *Kletschka* v. *Driver*, 411 F.2d 436, 445 (2nd Cir. 1969); *Scanwell Laboratories Inc.* v. *Shaffer*, 424 F.2d 859-873-4 (D.C. Cir. 1970); *Estrada* v. *Ahiens*, 296 F.2d 690, 698 (5th Cir. 1969); *Adams* v. *Witmer*, 271 F.2d 29, 34 (9th Cir. 1959).

See also *National Helium Corporation* v. *Morton*, 326 F.Supp. 151, 154 (D. Kan. 1971) aff'd 455 F.2d 650, *Lombard Corporation* v. *Resoc*, 321 F.Supp. 687, 692-693 (D.D.C. 1970); *Schroede Nursing Care, Inc.* v. *Mutual of Omaha Inc. Co.*, 311 F.Supp. 405-409 (E.D. Wis. 1970). Other courts have reached the same result by arguing that, if the defendant individuals have acted unlawfully, the action is not one against the sovereign. See e.g. *National Helium Corporation* v. *Morton*, 455 F.2d 650 (10th Cir. 1971).

[67] See pp. 49-50, *infra*.

[68] Under the Tucker Act, the Mandamus Act, the 1866 Civil Rights Act and 28 U.S.C. §1331, it is clear that, as in a Title VII action, the district court is required to consider all available evidence, make an independent determination of whether there was discrimination, and formulate a remedy, regardless of what may have transpired in any administrative proceedings. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1972). Under the Administrative Procedure Act, a court's responsibility to "review" agency action may be the same or somewhat narrower, depending upon the nature of the claim. This issue—the nature of review under the Administrative Procedure Act in a federal employment discrimination action—need not be decided in this case.

B. Application of Section 717 to Discrimination Occurring Before March 24, 1972

The Second Circuit concluded that §717 applies to discrimination occurring before its effective date, March 24, 1972. P. 9a-13a. In the light of this Court's decision in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), petitioner believes that the holding of the Court of Appeals on this issue was correct. See *Place* v. *Weinberger*, No. 74-116.

C. Section 717 Did Not Repeal Pre-Existing Remedies for Discrimination in Federal Employment

Any inquiry into the meaning of section 717 must begin with an examination of Title VII as it applies to private employees, since section 717 was adopted by Congress for the express purpose of giving federal employees the same rights as are enjoyed by employees in the private sector.

Under section 717, the Senate report stated, "Aggrieved employees or applicants will also have *the full rights* available in the courts as one granted to individuals in the private sector under Title VII."[69] Senator Dominick, one of the draftsmen of the Senate version of §717(c), argued:

> A federal employee . . . would . . . have a right . . . to go into court himself in order to get a solution to his problem . . . It seems to me that where we are dealing with job discrimination, it makes no difference what type of job you have, you should be entitled to *the same remedies* anyone else has, and this is a right to have the federal court determine whether[70] or not you have been discriminated against.

[69] S.Rep. No. 92-415, pp. 16-17 (emphasis added).

[70] 118 Cong. Rec. 3967 (emphasis added).

Senator Williams, the floor manager of §2515, agreed

> Previously, there have been unrealistically high barriers which prevented or discouraged a federal employee from taking a case to court. This will no longer be the case. There is no reason why a federal employee should not have *the same private right of action* enjoyed by individuals in the private sector. . . .[71]

Accordingly the rights afforded a federal employee under Title VII must be at least as great as those provided to private employees.[72]

Even prior to the adoption of §717, it was well established that that Title had not in any way repealed or preempted

[71] 118 Cong. Rec. 4922 (emphasis added).

[72] Section 717(d) expressly provides that, in litigation by federal employees, the provisions of section 706(f) through (g), regulating private Title VII litigation, shall be fully applicable. Only three distinctions appear on the face of the statute in the treatment of federal and private employees: (1) During the 180 day period before a civil action may be commenced, a federal claim is processed by the defendant agency and Civil Service Commission rather than EEOC. Congress so provided, despite its conviction that the Civil Service complaint process was generally ineffective, solely because it concluded that giving this responsibility to EEOC would "impose an unmanageable burden on that overworked and underfunded agency." 117 Cong. Rec. 31718 (Remarks of Senator Kennedy) (1971). (2) Federal employees must file a civil action under Title VII within 30 days of receipt of a "right to sue" letter, whereas private employees, who prior to 1972 also had a 30 day limit, are now allowed 90 days within which to sue. See §707(f), 717(c). The legislative history is silent as to the reason for, or any recognition of, this difference. The time limit under 706(f) was changed at several times during the consideration of the 1972 Act, and the failure of the draftsmen to conform §717(c) to the final alteration may have been inadvertent. (3) Certain provisions of section 706 refer to actions of the EEOC rather than the Civil Service Commission or other agencies, and thus may be technically inapplicable to federal employees. See §§706(g), (f)(1).

42 U.S.C. §1981 or any other pre-existing statutes.[73] This Court subsequently[74] held in *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975), that Title VII had not repealed pre-existing statutes providing remedies to private employees for racial discrimination in employment.[75] Since Title VII did not repeal the section 1981 rights of private employees, it necessarily follows that Title VII did not repeal the section 1981 and other pre-existing rights[76] of federal employees.

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[73] *Long* v. *Ford Motor Co.*, 496 F.2d 500, 503.04 (6th Cir. 1970); *Brady* v. *Bristol Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Young* v. *International Telephone & Telegraph*, 430 F.2d 757, 760-764 (3d Cir. 1971); *Boudreaux* v. *Baton Rouge Marine*, 437 F.2d 1011, 1016-17 (5th Cir. 1971); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097, 1100-01 (5th Cir. 1970).

[74] Since the adoption of §717 two other circuits have rejected the pre-emption argument. *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476, 484-85 (7th Cir. 1970); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 993-996 (D.C. Cir. 1973).

[75] "Despite Title VII's range and its design as a comprehensive solution for the problem of individious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." Similarly in *Alexander* v. *Garden-Denver Co.*, 415 U.S. 36 (1974) this Court held:

> [L]egislative enactments in this area have long envinced a general intent to accord parallel or overlapping remedies against discrimination . . . . Moreover, the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

415 U.S. at 47.

[76] The other statutes establishing the rights of federal employees to maintain civil actions in the district courts are set out *supra*, pp. 22-38. In addition, 28 U.S.C. §1491 confers jurisdiction on the Court of Claims over claims of racial discrimination in federal employment. See *Allison* v. *United States*, 451 F.2d 1035 (Ct. Cl. 1971).

Section 717 on its face contains no express repeal of any pre-existing statute. On the contrary, section 717(c)[77] provides

> Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution *and statutes* or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government. (Emphasis added)

The Second Circuit suggestion that section 717 tacitly repealed all pre-existing remedies encounters

> head-on the "cardinal rule . . . that repeals by implication are not favored." . . . The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give the effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.'"

Morton v. *Mancari*, 417 U.S. 535, 549, 551 (1974) Congress added the remedy in section 717, not because it thought existing remedies unduly harsh or excessive, but because it felt they had been "ineffective for the most part." *Id.*, p. 546. That Congress thus provided federal employees with independent overlapping remedies for racial discrimination is consistent with the general policy of providing

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[77] 42 U.S.C. §2000e-16(c).

such a variety of remedies for the protection of important civil rights.[78]

Congress has repeatedly and expressly rejected proposals to make Title VII the exclusive remedy for claims of racial discrimination in employment. In 1964 Senator Tower proposed an amendment making Title VII the exclusive remedy for discrimination in employment. The amendment was defeated on the floor of the Senate. 110 Cong. Rec. 13650-52. In 1972 Senator Hruska proposed an amendment which would have made Title VII the exclusive remedy for claims of employment discrimination. The amendment was opposed by the Department of Justice[79] and defeated on the Senate floor.[80] A similar proposal was rejected by the House Labor Committee.

[78] *Employment: Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974). *Housing:* 42 U.S.C. §3612, et seq. and 42 U.S.C. §1982; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 416-17, n. 20 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240 (1969). *Places of Public Accommodation:* 42 U.S.C. §2000a and 42 U.S.C. §1981; *Tillman* v. *Wheaton-Haven Rec. Assoc.*, 410 U.S. 431 (1973). *Voting:* 42 U.S.C. §1983 and 42 U.S.C. §1971(c); *Brooks* v. *Marcelli*, 331 F.Supp. 1350, 1352, n. 5 (E.D. Pa. 1971) (statutes authorizing suits by the Attorney General alleging violations of the 1957 Voting Rights Act did not repeal private cause of action under §1983).

[79] Hearings Before a Subcommittee of the Senate Committee on Labor and Public Welfare, 91st Cong. 1st Sess. 162-163 (1971). The testimony was quoted at length in the Senate debates. 118 Cong. Rec. 3369-70.

[80] In opposing the Hruska Amendment, Senator Javits argued:

"There are other remedies, but those other remedies are not surplusages. Those other remedies are needed to implement the promise we made under the Constitution to prevent discrimination in employment. The laws of 1866, 1871, as well as the law of 1964 are to implement that promise. . . . Mr. President, the key to the proposition which we laid before the Senate—incidentally, this has now been the law for the last 8 years—is that what this amendment would seek to do is cancel away much of that law. It seems to me that should not be the attitude of the Senate, in face of the fact, as I say, that employees are not fully protected by the exclusive remedy which is sought to be compelled by this amendment." 118 Cong. Rec. 3761-62. See also 118 Cong. Rec. 3371-72 (Remarks of Senator Williams) ("I believe that to make Title VII the exclusive remedy for employment discrimination would be inconsistent with our entire legislative history of the Civil Rights Act.")

The coverage of section 717 is clearly not coextensive with that of section 1981 and other pre-existing legal remedies. The statutes differ both as to relief available[81] and as to employees covered.[82] These earlier statutes provide for relief not necessarily available under Title VII. For these reasons it is apparent that section 717 and pre-existing statutes are not "irreconcilable" but complement one another and provide a diverse arsenal of remedies for an aggrieved federal employee.[83]

[81] Under section 1981 and section 1331 an employee would be entitled in appropriate circumstances to punitive or compensatory damages against the government officials individually. Such damages would also be awardable against the agency itself under section 1981 and the Tucker Act. Under remedies other than Title VII, particularly section 1981, a federal employee would not be subject to the limited exhaustion requirement of section 717(c). Section 717 has several advantages over alternative statutes: it provides for awards of attorneys' fees, court appointed counsel, and waiver of court costs, features which we may presume are particularly important to aggrieved federal employees of limited resources. Title VII's two year limitation on back pay, if applicable to the federal government, would not restrict the back pay available under any of the pre-existing remedies.

Section 706(g) provides that back pay liability shall not accrue "from a date more than two years prior to the filing of a charge with the Commission." A federal employee, however, does not file a charge with the E.E.O.C. but with his own agency or the Civil Service Commission. Whether such a limitation should nonetheless be imposed in federal cases because of the congressional policy of treating federal and private employees similarly under Title VII is a question not presented in this case.

[82] Section 717 does not cover aliens employed outside the limits of the United States, employees of the Government Accounting Office, and persons in the Government of the District of Columbia and the legislative and judicial branches who are not in the competitive service.

[83] Title VII, sections 1981 and 7151, Executive Order 11478, 5 C.F.R. part 713 and the Fifth Amendment, which bar dis-

In *Morton* v. *Mancari, supra,* the appellees urged that section 717, proscribing racial discrimination in government employment, had repealed *sub silentio* the provisions of the Indian Reorganization Act of 1934,[44] which established an employment preference for qualified Indians in the Bureau of Indian Affairs. Despite the apparent conflict between the provisions of the two statutes, this Court held that section 717 had not repealed the earlier law. If section 717 did not tacitly repeal an apparently inconsistent substantive rule, it follows *a fortiori* that it did not repeal pre-existing remedies enforcing the same substantive prohibition against racial discrimination established by section 717 itself.

II.

This Action Should Not Be Dismissed For Failure To Exhaust Administrative Remedies.

Petitioner maintains that an aggrieved federal employee should not be required to exhaust administrative remedies before invoking his independent statutory remedies. Even if the Court concludes that such exhaustion should generally be required, it was improper to dismiss the instant action because, *inter alia,* (1) the administrative agency had already exceeded by a year the legal deadline for processing discrimination complaints, (2) petitioner was not afforded a hearing on his claim that further exhaustion would have been futile, and (3) when an employee has failed to adequately exhaust, the district court should not dismiss the action but should issue an appropriate stay of judicial proceedings while exhaustion is completed.

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crimination in federal employment, necessarily bar any reprisals by federal officials for the filing of complaints alleging such discrimination.

[44] 25 U.S.C. §461.

A. Exhaustion of Administrative Remedies Is Not a Prerequisite To An Action Under The 1866 Civil Rights Act, etc.

In the instant case petitioner took all steps necessary to apply for a promotion to GS-9, which was denied June 27, 1971.[45] The question presented is whether, prior to maintaining a non-Title VII action, he was also required to collaterally attack the decision of June 27 by invoking the procedures established by 5 C.F.R. part 713. The decision as to whether to require exhaustion depends upon the nature of the claim and "the particular administrative scheme at issue." *Weinberger* v. *Salfi,* 43 U.S.L.W. 4985, 4990 (1975). Even where a statutory scheme expressly requires exhaustion, this Court has permitted resort to the courts without complete exhaustion under appropriate circumstances. See e.g. *McKart* v. *United States,* 395 U.S. 185 (1969); *Weinberger* v. *Weisenfeld,* 43 U.S.L.W. 4393 (1975). Unlike Title VII, neither the 1866 Civil Rights Act nor the other statutes relied on by petitioner contain any express exhaustion requirement.[46] This Court should "not engraft on the statute[s] a requirement that may inhibit the review of claims of employment discrimination in the federal courts." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 799 (1973).

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[45] This is not a case in which an employee sued over a promotion for which he had never applied. Compare *McGee* v. *United States,* 402 U.S. 479 (1971).

[46] Section 704 of the Administrative Procedure Act requires under certain circumstances that the agency action attacked be "final." This is a general requirement of ripeness, not mechanical exhaustion, and has been applied "in a pragmatic way" considering both the nature of the issue and the burden on the parties. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148-150 (1967).

1. *Independent Remedies*

The question of exhaustion, like that of implied repeal, must be resolved primarily with reference to the rights of private employees under similar circumstances.[87] For federal and private employees alike, "[t]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 30, 48 (1974). Precisely because of the independent nature of these remedies a private employee is not required to invoke them in any particular order. A private employee need not, for example, exhaust his Title VII administrative remedies before filing a §1981 action—indeed, under certain circumstances he may not so delay commencing his §1981 action. *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975). This comports with the general rule that the exhaustion of state administrative remedies is not a prerequisite to civil rights litigation in the federal courts.[88]

Federal employees should not be subjected to the burden of an exhaustion requirement from which all state and private employees are immune. A federal employee is afforded a comparable arsenal of independent remedies, and he is free to choose whether to invoke §1981, the Tucker Act, the Mandamus Act, etc. The administrative complaint procedure established by 5 C.F.R. part 713 is another such administrative remedy available to a federal employee which he can choose to invoke when he concludes it is the best course. Congress has to a limited extent required an

[87] See pp. 38-39, *supra*.

[88] *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, 365 U.S. 167 (1961).

employee to use this administrative remedy before filing a Title VII action,[89] but no such precondition is placed on actions under other statutes.

The creation of the E.E.O.C. administrative remedy by Title VII for state and private employees has been held not to reflect a Congressional requirement that all private compaints be processed there first. That reasoning applies *a fortiori* to section 717(c), which did not create the administrative remedy but was intended instead to *limit* any obligation to use that already existing procedure and does not involve problems of comity.[90] This independence of remedial schemes is consistent with the decisions of this Court in construing the civil rights acts to give "due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims". *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967).

The reasoning of *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975), rebuts the suggestion of the Second Circuit that a federal employee not only can but must so delay his §1981 action pending exhaustion. In a number of states, including that involved in *Johnson*, the statute of limitations applicable to a §1981 case is one or two

[89] The employee need not process his claim all the way through the Appeals Review Board, or even await final agency action; he may commence suit if final agency action has not occurred within 180 days of filing his administrative complaint. Section 717(c). A majority of all administrative complaints are not decided within 180 days, despite an express requirement in §713.220 that they be resolved in that time.

[90] "[T]he policies behind the requirement of exhaustion of state administrative remedies are even stronger than those requiring exhaustion of federal administrative remedies, because of comity considerations. Thus if state exhaustion is not required, *a fortiori*, exhaustion of federal remedies should not be required." *Penn* v. *Schlesinger*, 490 F.2d, 700, 707 (5th Cir. 1974) (Morgan, *J.*, Concurring), rev'd 497 F.2d 970 (5th Cir. 1974).

years.[91] Petitioner's case, however, was already 19 months old when final agency action occurred, and doubtless would have aged still further pending an appeal to the Appeals Review Board.[92] Particularly in view of the severe limitations on the types of claims that may be processed under the Civil Service Regulations,[93] it is unlikely that there will be a "complete identity of the causes of action" considered in that process and raised in the §1981 action. 44 L.Ed. 2d at 306, n. 14. In view of the policy that federal and private employees be treated alike, a federal employee should not be compelled to endure a delay before filing a §1981 action under circumstances which, if acquiesced in by a private employee, could be characterized as sleeping on his rights.

The administrative and judicial processes might prove complementary if an employee chooses to pursue them simultaneously. A section 1981 action would entitle the employee to invoke discovery procedures, which are essential to unearth the facts but which are not available in the administrative process. The administrative process, on the other hand, may involve opportunities for conciliation, *e.g.*, through the efforts of the E.E.O. Counselor.[94] The employee would be free to seek to stay or accelerate the judicial proceeding to dovetail with activities in the

[91] Code of Ala., Title 7, §5526 (1 year); Tenn. Code Anno., §28-304 (2 years); Code of S.C., §10-146 (2 years); Anno. Code of Cal., §1422 (2 years); Vernon's Anno. Texas Revised Civil Statutes, Art. 5526 n. 193.5 (2 years).

Petitioner's complaint was filed within the 3 year New York statute of limitations. Civil Practice Law and Rules, §214.

[92] The regulations place no limitation on the amount of time the Board may delay before deciding an appeal.

[93] See pp. 53-54, *infra*, p. 43, *supra*.

[94] 5 C.F.R. §713.213.

administrative process. See *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d at 304.[95]

2. *Purposes of Exhaustion*

This Court has delineated criteria which must be considered in determining if exhaustion is to be required, including whether agency expertise or agency discretion are required, whether exhaustion is needed to permit an agency to learn the relevant facts or corerct its mistakes, and whether resort to the administrative process is likely to be futile. *McKart* v. *United States*, 395 U.S. 185, 194-5 (1969); *Weinberger* v. *Salfi*, 43 U.S.L.W. 4985, 4990 (1975); *Weinberger* v. *Weisenfeld*, 43 U.S.L.W. 4393, 4395, n. 8 (1975). These factors militate against requiring exhaustion in federal employment discrimination cases.

The agencies have no particular expertise to offer. The issue is not a matter of ordinary personnel management, but of unlawful discrimination. Congress expressly concluded in 1972 that the Civil Service Commission itself was lacking in such expertise.[96] After 10 years of employment discrimination litigation the federal courts are considerably more expert in the applicable legal problems than personnel officials inside or outside government.[97] The

[95] A court could not impose such a stay over the objection of the employee, since to do so would be the equivalent of establishing an exhaustion requirement. Cf. *Grubbs* v. *Butz*, 514 F.2d 1323 (D.C. Cir. 1975).

[96] Both the House and Senate Reports noted that the Commission "has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination within the system." H.R. Rep. No. 92-238, p. 24; S. Rep. No. 92-415, p. 15.

[97] The pre-eminent example of this expertise is the area of testing, where the courts have invalidated as not job-related standardized tests in widespread industrial use. See *Griggs* v. *Duke Power Co.*, 461 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880 (1975).

government officials who process these complaints are ill equipped to deal with the complex law that has grown up in the area; the regulations do not require that the officials involved be attorneys, and the instruction manuals are largely devoid of reference to applicable court decisions. Even among the decisions of the Appeals Review Board, reliance on or citations to the law as announced by federal courts is virtually non-existent.[28] Frequently the processing of discrimination complaints is in the hands of officials whose primary duties lie elsewhere. Clearly these officials have far less expertise than the E.E.O.C., yet the courts do not, out of deference to the E.E.O.C., delay action in a §1981 case or give weight to its determinations in a particular case. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

This is not an area in which the agencies may properly be said to have any discretion. Once the facts are established, the conclusions and remedy follow as a matter of law. See *McKart* v. *United States*, 395 U.S. 185 (1969); *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880 (1975). The resolution of those statutory and constitutional issues "is a primary responsibility of the courts, and judicial construction has proved especially necessary" with respect to §1981, whose broad language frequently can be given to meaning only by reference to public law concepts. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). Agency discretion seems particularly inappropriate in a case of alleged discrimination, for it is a claim which calls into question the motives of the very agency officials deciding the case. Compare *Glover* v. *St. Louis, etc., R.R.*, 393 U.S. 324, 331 (1969). It is particularly for this reason that the courts must be regarded as the forum "for the ultimate resolution of discriminatory employment claims."

[28] See n. 102, *infra*, p. 52.

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 60, n. 21 (1974).

Nor is this the type of case in which exhaustion is necessary to permit the agency to develop a factual record. That principle is applicable to a situation such as a rate making case, where the relevant evidence is in the possession of the plaintiff and the agency uses its power and expertise to develop a record. In an employment action, however, the relevant evidence is almost entirely in the possession of the defendant agency, which clearly does not need an administrative proceeding to learn what its records and employees would reveal. The plaintiff needs that information, but he usually cannot rely on the administrative process to develop a factual record, because there are no provisions whatever for discovery. Compare *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24, n. 23 (1974).

This Court has long recognized that exhaustion should not be required where there is no reasonable chance that the administrative proceedings will result in a decision favorable to the complainant. *Weinberger* v. *Salfi*, 43 U.S.L.W. 4985, 4990 (1975). Congress concluded in 1972, after extensive hearings, that the administrative complaint process had proved "ineffective for the most part," and "had impeded rather than advanced the goal of the elimination of discrimination in Federal employment." [29] The Civil Rights Commission concluded in 1975 that the Civil

[29] H. Rep. No. 92-238, pp. 23-24, stated:

> A critical defect of the federal equal employment program has been the failure of the complaint-process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment. The defect, which existed under the old complaint procedure, was not corrected by the new complaint process. The new procedure, intended to provide for the informal resolution of complaints, has, in practice denied employees adequate opportunity for impartial investigation and resolution of complaints.

Service "Commission's regulations governing complaint procedures by agencies deny Federal employees a full and fair consideration of their employment discrimination grievances." [100] The Civil Rights Commission found that the administrative process was biased against the aggrieved employee for a wide variety of reasons, including: (1) the failure of the agencies and the Appeals Review Board to follow Title VII law; (2) unreasonable time and other technical limitations on administrative complaints; (3) effective refusal to process class action allegations; (4) control of the entire investigation and decision process by the defendant agency;[101] (5) inadequate instructions to investigators.[102] The Commission found that, in Fiscal 1973, although federal employees made

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Under the revised procedure, effective July 1, 1969, the agency is still responsible for investigating and judging itself. Although the procedure provides for the appointment of a hearing examiner from an outside agency, the examiner does not have the authority to conduct an independent investigation. Further, the conclusions and findings of the examiner are in the nature of recommendations to the agency head who makes the final agency determination as to whether discrimination exists. Although the complaint procedure provides for an appeal to the Board of Appeals and Review in the Civil Service Commission, the record shows that the Board rarely reverses the agency decision.

The system, which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest.

See also, S.Rep. No. 92-415, p. 14.

[100] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, p. 621 (July, 1975); p. 31aa. The relevant portions of the Report are reprinted in Appendix B to this brief.

[101] Compare *Glover* v. *St. Louis, etc., RR.*, 393 U.S. 324, 331 (1969).

[102] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, pp. 61-86, 619-24, 655-59, pp. 3aa-39aa.

26,627 informal complaints to E.E.O. Counselors, and filed 2,743 formal written complaints, only 22 federal employees received back pay or retroactive promotions.[103] It is readily apparent from the Commission's Report that for a federal employee aggrieved by racial discrimination resort to the administrative process is futile.

There are, moreover, a wide variety of complaints cognizable in court for which the regulations do not authorize relief. The agency will not give relief for discrimination occurring more than 30 days before the complaint process is begun, even if a continuing violation is involved.[104] Thus, although petitioner's administrative complaint alleges a continuing policy of discrimination since 1967,[105] petitioner could not win complete relief in the administrative process, since the agency could not give him back pay or other relief for the period before June, 1971. In the courts, however, the statutes of limitations are far longer[106] and, where a continuing violation is involved, relief is not limited by such statutes. Monetary compensation under the regulations is limited to back pay,[107] but under the Tucker Act and the 1866 Civil Rights Act petitioner would be entitled under appropriate circumstances to compensatory or punitive damages against the agency, and, under the 1866 Act and §1331, against the individual defendants. Thus, even if petitioner were to "prevail" in the administrative process, he still could not receive all the relief to which he

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[103] Id., pp. 67, 85; pp. 9aa, 27aa.

[104] 5 C.F.R. §713.214; United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, pp. 65-66, pp. 7aa-8aa.

[105] Appendix, p. 15a.

[106] The New York statute of limitations is 3 years, 36 times as long as the 5 C.F.R. §713.214 limitation.

[107] 5 C.F.R. §713.271.

might be entitled in court. Moreover, because the burden of proof placed on an employee in the administrative process is far more stringent than that applied by the courts, the same evidence which would be deemed insufficient by the agency could, in a court of law, compel judgment for the employee.[108] In addition, there are a variety of possible technical defects which would doom an administrative complaint to rejection, but would in no way limit the jurisdiction or power of a court to grant relief.[109]

The issue presented by this case is *not* whether federal agencies will be precluded from investigating or remedying unlawful discrimination because an employee filed a lawsuit rather than pursuing an administrative complaint. No statute, regulation or Executive Order forbids any federal official from stopping or remedying discrimination merely because an administrative complaint has not been filed or pursued. On the contrary, section 717(e), section 7151, and the Civil Service Commission Regulations[110] require supervisory officials to investigate, stop and fully remedy any problem of investigation regardless of whether an administrative complaint has been filed. Compare *Christian* v. *New York Department of Labor*, 414 U.S. 614, 624, n. 10 (1974). This responsibility reflects the fact that, in our

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[108] See United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, pp. 78, 84; pp. 20aa, 26aa.

[109] Id., pp. 65-69; pp. 7aa-11aa. In Fiscal 1974 10 percent of all administrative complaints were rejected on such technicalities.

Petitioner maintains that each of these limitations and defects in the administrative process is unlawful; whether they are in fact invalid is a question not presented by this case.

[110] 5 C.F.R. §713.203. Any regulation which required or even permitted agency officials to tolerate discrimination in the absence of a well pleaded administrative complaint would, of course, be invalid.

constitutional scheme, racial discrimination is not a minor personal inconvenience but a violation of fundamental national policies. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The law requires the federal government, as it does private employers, "to self-examine and self-evaluate their employment practices, and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880, 4884 (1975).

In the ordinary course of things an agency or its officials, acting *sua sponte* after the commencement of a lawsuit, would be able to resolve any problem of discrimination well before a court could actually set the matter for trial, benefiting directly from any discovery in that proceeding. The plaintiff employee would of course cooperate with any such investigation and the process would not need to differ significantly from the administrative complaint procedure in which the prime movant and investigator is supposed to be the agency itself. In *Penn* v. *Schlesinger*, however, the government suggested that, although the most virulent form of discrimination might well be practiced at Maxwell Air Force Base, and although officials there might be systematically breaking the law, there was nothing that the Secretary of Defense or anyone else could do unless Mr. Penn would drop his lawsuit and file an administrative complaint. See *Penn* v. *Schlesinger*, 490 F.2d 700, 706 (5th Cir. 1973); 497 F.2d at 975-76 (5th Cir. 1974). That contention is not merely wrong, it reflects an attitude which underlies the whole problem of exhaustion. If federal officials had recognized that they had an independent responsibility to assure non-discrimination, the agencies involved would *sua sponte* have long ago completed their consideration of these problems of discrimina-

tion, and the exhaustion issue in this case and *Penn* would be moot.

3. *Other Policy Considerations*

A variety of other considerations militate against an exhaustion requirement in federal employment discrimination cases.

In terms of futility alone, any exhaustion rule would be honeycombed with exceptions. A very substantial portion of all employees would be able to establish that some or all of their complaint would not stand a reasonable chance of success. Any relevant allegation of futility would require an evidentiary hearing of potentially vast scope.

The futility or efficacy of the administrative process would necessarily vary from agency to agency and over time. In a case such as this, where petitioner challenges the efficacy of taking discrimination appeals to the Appeals Review Board, a detailed inquiry as to the workings and record of the Board would be necessary. A decision after any such inquiry would not be *res judicata* as to other employees, and would apply as a matter of collateral estoppel against the agency or Board only until its practices materially changed. Manifestly the time consumed in adjudicating exhaustion questions would easily exceed the judicial efforts that might be saved by an exhaustion requirement. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 59 (1974).

If an exhaustion rule were applied to these cases, the courts would be obliged to decide, not only whether to require exhaustion in each case, but what steps were necessary to exhaust. A federal employee aggrieved by employment discrimination may find his complaint covered by several of the nine overlapping and inconsistent administrative procedures.[111] The regulations provide no guidance as to how to proceed in such a situation.[112] Within each procedure there are a variety of ways in which an employee can process his complaint; he must decide what issues to raise in the complaint, whether to demand a hearing, etc. Congress in 1972 concluded that, where federal employees were confronted by a government defense of failure to exhaust administrative remedies, there is "no certainty as to the steps required to exhaust such remedies".[113] The time and energies of the lower courts are already being consumed by government arguments that aggrieved employees chose the wrong administrative process.[114] Those judicial resources would be far better spent deciding these cases on the merits than resolving scholastic controversies about the "correct" way to exhaust.

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[111] These include (a) charges of reprisal, 5 C.F.R. §713.261-.263, (b) third party complaints, 5 C.F.R. §713.251; (c) allegations of discrimination in an adverse action proceeding, 5 C.F.R. §772.306; (d) appeal from termination of a probationary employee, 5 C.F.R. part 315; (e) challenge to Civil Service Commission job requirements, 5 C.F.R. §300.103-.104; (f) appeals from a reduction in force, 5 C.F.R. part 351; (g) a grievance proceeding, 5 C.F.R. part 771; (h) appeal from a reduction in grade, 5 C.F.R. part 532; (i) a simple allegation of discrimination, 5 C.F.R. part 713.

[112] Notwithstanding 5 C.F.R. §713.219, the general practice is to require federal employees to make an election of administrative remedies, and to do so without any explanation as to the procedural and substantive consequences of the choice.

[113] S. Rep. No. 92-415, 92nd Cong., 1st Sess. p. 16.

[114] See e.g. *McHoney* v. *Callaway*, No. 74-C-1729 E.D. N.Y. (government contends employee erred by invoking adverse action process rather than §713); *Swain* v. *Callaway*, 5th Cir. No. 75-2002 (government contends employee erred by failing to demand an administrative hearing); *McLaughlin* v. *Callaway*, No. 74-1237, S.D. Ala. (government contends employee erred by filing an ordinary administrative complaint rather than a third party complaint).

Exhausting administrative remedies often poses a serious burden on the employee. Where the employee is seeking a promotion or a job, or a substantial award of back pay, the delay may well mean that the essential needs of the employee and his family will go unmet. If the employee wants to pursue the administrative process seriously and thus retains an attorney, the out of pocket cost will be substantial compared to the income of ordinary civil servants, and regulations do not provide for awards of counsel fees even if he wins.[115] The time and effort which must be expended on the administrative complaint may be substantial.

There are, to be sure, a variety of reasons why an employee would want to resort to the administrative process *if* it offers a reasonable chance of success—it is less expensive, less formal, and less time consuming than an ordinary court case. Given these advantages, and the possible forfeiture of his Title VII rights,[116] an employee would be foolhardy to abandon the administrative route so long as there is a meaningful chance that he can obtain there the relief he seeks. *McKart* v. *United States*, 395 U.S. 185, 200 (1969). But there are situations in which such a meaningful chance of success does not exist, and the minute possibility is far outweighed by the burdens on the employee. In such circumstances the employee ought, in all fairness, to have immediate access to the courts.

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[115] Petitioner maintains the absence of such a provision is unlawful, and that a prevailing employee would be entitled to a court award for counsel retained in connection with the administrative proceeding.

[116] If an employee sued under §1981 without ever filing an administrative complaint he could not invoke section 717. If the employee filed a complaint but sued before both final agency action and the passage of 180 days, his section 717 right to sue would accrue on the occurrence of either event and he could then add that basis of jurisdiction to his complaint.

The question is whether an employee or the Court should decide whether those circumstances are present. The employee knows the internal workings of the agency, the fate of past complaints, the attitudes of officials who will decide the case, the influence of the defendant supervisors, and the extent to which his complaint is within the scope of the administrative remedies, and he is particularly aware of the burden that further administrative proceedings would impose on him in terms of time, effort, the cost of an attorney, and the delay until relief is finally awarded. The employee's self-interest will preclude abandoning the administrative process except where it is clearly futile or unreasonable delay has occurred. There is no reason to believe that a federal judge, unfamiliar with the processes and history of the agency, unaffected by the burdens of further delay, and preoccupied with the problem of reducing his docket, would better able to make this judgment than the employee.[117]

The very requirement of exhaustion may tend to undermine the effectiveness of the administrative process. Under the applicable regulations the employee has a great degree of control over the nature of the process and, consequently,

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[117] It is noteworthy that, in section 717, Congress gave the employee broad discretion to decide when it was in his interest to continue in the administrative process. At any time 180 days after filing a complaint or after filing an appeal, and after final agency action, the employee can choose to pursue that process or to file a civil action. The employee's decision is, of course, binding on the court, which has no authority to require further administrative proceedings but must itself hear the case as expeditiously as possible. *Grubbs* v. *Butz*, 514 F.2d 1323 (D.C. Cir. 1975).

Similarly, if a federal employee's claim is like or related to that of second employee who files a class action under section 717, the first employee may participate in that section 717 class action without filing an administrative complaint, or may choose to file such a complaint in addition to or instead of participation in the class action.

over how long it will take. If an employee insists on a detailed investigation, provides the investigator with much information,[118] negotiates at length on the basis of the investigation,[119] asks for a full hearing,[120] asks for his own witnesses to be called for such a hearing and subjects other witnesses to lengthy cross examination, and, if unsuccessful, files a substantial brief with the Appeals Review Board, both the agency and Board action will doubtless take longer and far exceed the 180 limit. If, on the other hand, the employee believes the administrative process is futile and knows he has to complete it before suing, he can substantially abbreviate it by waiving various aspects of the process. An exhaustion requirement would tend to force an employee to follow the latter course, and thus decrease the likelihood of any favorable administrative ruling and increase the probability that judicial intervention will be required.

So long as every employee is required to go through that process, the agency has no incentive to make the process either expeditious or fair. On the contrary, a process replete with delays and heavily biased against the employee serves the dual purpose of postponing the day when the agency is brought into court and of so discouraging and exhausting the complainant that he is unlikely to sue. Such seems to have been the effect in recent years of the agency assumption that exhaustion is required. In 1972 Congress clearly identified a wide range of defects in the administrative process and mandated the Civil Service Commission to reform it. Since then, however, virtually none of the problems Congress identified have been solved, and the regulations which Congress found

[118] 5 C.F.R. §713.216.

[119] 5 C.F.R. §713.217(a).

[120] 5 C.F.R. §713.217(c).

totally inadequate remain largely unchanged.[121] This situation may be a direct result of the belief by the Commission and agency officials that employees would have to suffer through the administrative process no matter how bad it might be. In the long run, of course, this means that fewer cases will actually be remedied in the administrative process and that more aggrieved employees will end up in court.

The absence of an exhaustion requirement, however, would create the incentive for reform that has heretofore been missing. The Commission and affected agencies would naturally prefer that complaints of discrimination not be brought to court. If an aggrieved employee is free to choose between the administrative process and direct access to the courts, government officials will have to take steps to render that process attractive to employees, in terms of both speed and effectiveness, or the process will be less likely to be used. That would tend to deter agency officials from withholding information about the complaint process or discouraging its use. Compare *Penn* v. *Schlesinger*, No. 74-476.

B. Even If Exhaustion Is Generally Required In Such Actions, It Should Not Be Required In This Case

Assuming, *arguendo*, that the requirement of exhaustion is applicable to section 1981 actions against the federal government, that is not conclusive of the correct disposition of this case. Even where exhaustion is generally appropriate, that requirement should not be "blindly" applied. *McKart* v. *United States*, 395 U.S. 185, 201 (1969).

[121] See United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, pp. 61-62; pp. 3aa-4aa.

The Second Circuit, however, did not consider whether such exhaustion was appropriate on the facts of this particular case. The Court of Appeals stated "There is nothing in the allegations of Brown's complaint which justifies the 'premature interruption of the administrative process'". P. 16a. This statement is somewhat unfair. At no time prior to oral argument in the Court of Appeals did the United States ever contend that petitioner had not adequately exhausted his administrative remedies. Neither in its various motions in the district court, nor in its lengthy appeal brief, did the Department of Justice suggest petitioner was obligated to appeal to the Appeals Review Board. Petitioner, assuming that no further exhaustion was required since he had met the exhaustion standards of §717(c), repeatedly asserted he had fully exhausted his administrative remedies.[122] Only at oral argument did the government suggest that petitioner might have had an obligation to appeal to the Board. While it may have been within the discretion of the Court of Appeals to permit the government to raise such an entirely new issue for the first time at oral argument, it certainly was unreasonable to penalize petitioner for having failed to respond to that argument some 18 months *earlier* when his complaint was filed.

The delays which had already occurred in the processing of his complaint excused petitioner from any responsibility to further exhaust. The Civil Service Commission's regulations expressly require that every agency must take final action on an employment discrimination complaint within 180 days after it is filed. 5 CFR §712.220(a). Section 717 (c), which embodies a congressional determination as to the maximum amount of delay to which a federal employee should be subjected, gives such employees a right to sue without further exhaustion 180 days after a complaint is

[122] Brief for Appellant, No. 73-2628, 2d Cir. pp. 2, 61.

filed. In the instant case the defendant agency consumed 617 days processing petitioner's complaint. The agency had been in violation of the government's own regulations for over a year when petitioner finally filed suit.

Petitioner urges that, if exhaustion is required in these cases, the courts should adopt this 180 day rule as fixing the point in time after which further efforts at exhaustion are not required in a non-Title VII action. That time limit reflects the considered judgment of Congress and the Civil Service Commission as to what would constitute a reasonable deadline, considering both the burdens on the employee and the time needed for an expeditious administrative proceeding. Such a rule would be congruent with the comparable provisions of Title VII, would provide a clear standard by which both agencies and employees can guide their conduct, and would avoid the uncertainty and litigation generated by an *ad hoc* approach in each case.

Federal employees are also entitled to sue under §717 once final agency action has occurred. Employees should be equally free to invoke their non-Title VII remedies at that point as well, regardless of whether 180 days have passed. The provision in §717 allowing federal employees to sue without taking an appeal to the Appeals Review Board is based on an express congressional determination that such appeals are usually futile because "the record shows that the Board rarely reverses the agency decision".[123] Inasmuch as the entire exhaustion doctrine, unlike statutes of limitations[124], is a creation and creature of the federal judiciary, this Court should, we submit, defer to congressional judgment in this regard rather than requiring the aggrieved employee to prove in each case that such an

[123] H. Rep. 92-238, 92nd Cong., 2d Sess., p. 24.

[124] See *Johnson* v. *Railway Express Agency*, 44 L. Ed. 2d 295, 302 (1975).

appeal would be pointless.[125] If an employee were required either to appeal to the Appeals Review Board or to impair his non-Title VII rights,[126] he would have to choose between such impairment and sacrificing the right deliberately provided by Congress under §717 to sue without further delay. Such a result would change sections 717 and 1981 from complementary to conflicting remedies, and tend to require an employee to elect between them.[127]

Petitioner, moreover, maintains that, as a matter of fact, an appeal to the Appeals Review Board would be futile. The Board's Annual Reports clearly establish a *prima facie* case of futility—in the last three fiscal years the Board has reversed an agency decision and entered a finding of discrimination in only 37 of 1876 appeals, less than 2%.[128] In most of the 37 cases, moreover, neither back pay nor promotions were awarded to the complainant. If afforded an appropriate evidentiary hearing on this question, petitioner would adduce evidence demonstrating why so few appeals are successful and that the process is little more than an empty ritual.[129]

[125] See p. 51, *supra*.

[126] Those rights would not be forfeited by his failure to take such appeal, provided he took it later upon being afforded an opportunity to do so by the court. See pp. 65-67, *infra*.

[127] Such forced elections among independent remedies is contrary to the congressional scheme. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974). It is manifestly inconsistent with *Alexander* to require an aggrieved employee to sacrifice his rights under one remedy as a condition of receiving relief under another remedy. Were the rule otherwise, an employer could condition the providing of partial relief under one independent scheme upon the waiving of the employee's rights to seek complete relief under a complimentary scheme, a clearly impermissible result. It is unclear whether an employee might be able to partially avoid this dilemma by suing under §717 on the 5th day and appealing to the Board on the 10th day, but Congress certainly did not contemplate that such tactical maneuvering would be necessary to preserve independent remedies.

[128] Board of Appeals and Review, Work Load Statistics. Fiscal Years 1972, 1973, 1974. See *Sperling* v. *U.S.*, 9 EPD ¶ 10,100, p. 7487 (3d Cir. 1975).

In any event, if this Court, or the district court on remand, should conclude that petitioner had an obligation to further exhaust the administrative remedies, the proper disposition of the case would not be an outright dismissal. At least since *Prentis* v. *Chesapeake & Ohio Railway*, 211 U.S. 210, 232 (1908), it has been clear that, where a party has not properly exhausted his administrative remedies, the court is not to dismiss the case but merely to stay proceedings while that administrative proceeding is resumed and completed.[130]

In *Penn* v. *Schlesinger*, No. 74-476, the government, while objecting that plaintiffs had not exhausted their administrative remedies, did not seek a dismissal with prejudice,

[129] At such a hearing the evidence would show: (1) that the Board virtually never follows or even considers substantive federal law as expounded by the courts regarding employment discrimination; (2) that the Board members have neither expertise nor experience in employment discrimination or personnel matters; (3) that there has been racial discrimination in the promotion of Board personnel; (4) that Board members tend to vote along racial lines; (5) that the Board does not treat its earlier decisions as meaningful precedent, and decides each case on an *ad hoc* basis; (6) that the seven members of the Board write each year approximately 3,000 opinions totaling some 15,000 pages, and that this volume of work precludes Board members from significant consideration of the facts of each case; (7) that the opinions in each case are drafted by appeals examiners employed by the Board before it is considered by the members, that these drafts are rarely altered by the Board, and that the examiners are primarily recent law school graduates with no experience whatever in federal personnel problems, employment discrimination questions, or the practice of law.

[130] See also *Christian* v. *New York Department of Labor*, 414 U.S. 614, 624 (1974); *Pacific Telephone, etc. Co.* v. *Keykendall*, 265 U.S. 196 (1924); *Parisi* v. *Davidson*, 405 U.S. 34, 36 (1972); *Somma* v. *United States*, 283 F.2d 149 (3d Cir. 1960).

but asked only that the plaintiffs be required to complete exhaustion. The government correctly recognized that, if this procedure were followed, a time limit should be placed on further administrative proceedings to prevent unfair delay.[131]

Where a litigant has failed to satisfy applicable exhaustion requirements, this is certainly the correct approach.[132] It would of course be inappropriate for any governmental defendant to object that there were as yet unused administrative processes, and yet oppose permitting the plaintiff to invoke such procedures. That is particularly true for federal employees as to whom Congress itself has determined that the exhaustion requirements are unclear.[133] An employee should not be required to guess, at peril of forfeiting his claim, when the moment has arrived which a court may later determine was the right time to sue. Accordingly, if this Court or the district court concludes that petitioner

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[131] Appellants' Supplemental Brief on Rehearing *En Banc, Penn* v. *Schlesinger*, No. 72-3684, 5th Cir. p. 10, n. 9. "On the remand the district court should proceed by dismissing the complaint without prejudice to the plaintiffs filing a new action, if necessary, upon exhaustion of administrative remedies. In the alternative, the district court could simply stay all further proceedings until plaintiffs have exhausted their administrative remedies. Cf. *Somma* v. *United States*, 283 F.2d 149 (C.A. 3, 1960). The court may also wish to specify a time period within which the defendant agencies could act on plaintiff's claims and after which plaintiffs could return to court. This approach was adopted in the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16(c) which gives agencies 180 days from the filing of the initial charge within which to act after which the aggrieved employee or applicant may file suit."

[132] In a section 717 action, of course, such a stay of judicial proceedings would be inappropriate once the specific exhaustion requirements of that statute were met. Congress authorized the filing of a civil action after 180 days because it concluded that it would be unfair to the plaintiff to require him to delay further. *Grubbs* v. *Butz*, 514 F.2d 1323 (D.C. Cir. 1975).

[133] See p. 57, *supra*.

was required to further exhaust his administrative remedies, the district court on remand should permit petitioner to file an appeal with the Appeals Review Board, and if he does so, to issue an appropriate stay of further proceedings[134] for a period of no more than 180 days while the Board considers that appeal.

CONCLUSION

For the above reasons, the judgment and opinion of the Second Circuit should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
BARRY L. GOLDSTEIN
BILL LANN LEE
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030

Counsel for Petitioner

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[134] The stay would not normally bar all judicial proceedings. Under most circumstances, as in the instant case, discovery should be permitted during this period, since there is no provision for discovery in the administrative process and the information revealed would be of assistance to the agency or Board, and, if they deny relief, to the court.

APPENDIX

Appendix A*

Region Two—General Services Administration
Work-Force Analysis By G.S. Grade
November 30, 1973

G.S.	*White*	*Other** Minority*	*Black*	*Total*	*% of Total Black*
1	—	—	—	—	—
2	2	—	6	8	75%
3	78	14	48	140	34%
4	192	21	71	284	25%
5	205	31	87	323	27%
6	55	4	21	80	26%
7	80	12	25	117	21%
8	15	1	2	18	11%
9	92	5	17	114	15%
10	—	—	—	—	—
11	140	1	21	162	13%
12	107	10	5	122	4%
13	52	3	3	58	6%
14	23	1	2	26	8%
Totals	1041	103	308	1452	21.2%

	Black Male	*Black Female*	*White Male*	*White Female*
Average Grade	6.89	5.25	8.8	5.08

* This compilation derives from Affirmative Action Plan FY 1975, G.S.A., Region Two. It is not part of the record in this case.

** Spanish Surname, American Indian & Oriental

Appendix B

Excerpt from *The Federal Civil Rights Enforcement Effort—1974*, Volume V, To Eliminate Employment Discrimination.

A Report of the United States Commission on Civil Rights, July 1975.

(See Opposite) ☞

IV. Processing Title VII Complaints

Prior to the extension of Title VII coverage to Federal employment, the Commission had issued regulations governing employment discrimination complaints brought under Executive Orders 11246 and 11478.[201] In 1971, congressional committees in both the House and Senate strongly criticized the Commission's complaint procedures and determined that they may have actually denied employees impartial investigations and fair consideration. Bias against complainants appeared to the committees to be inherent in the procedures, since the allegedly discriminatory agencies were responsible for investigating the complaints and rendering final decisions, unbound by the findings of the hearing officers. Agencies' final decisions were appealable to the Commission's Board of Appeals and Review (BAR), but were affirmed in most cases.[202] Finally, the committees found that the complaints system, as well as other parts of the Federal Equal Employment Opportunity (EEO) program, had been seriously weakened by the Commission's narrow view of discrimination as primarily a problem of individual bigotry rather than the result of systemic practices.[203] The Senate committee, whose provisions on

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201. 5 C.F.R. § 713.211, et seq. (1969).

202. Legislative History, supra note 42, at 84 and 423.

203. Id. The Commission's complaint procedures were also strongly criticized in a report prepared by Ralph Nader's Public Interest Research Group in June 1972. See M.W. Brewer, Jr., Public Interest Research Group, Behind the Promises: Equal Employment Opportunity in the Federal Government (1972).

Federal employment ultimately passed, reported that the new Title VII authority was "...intended to enable the Commission to reconsider its entire complaint structure and the relationship between the employee, agency and Commission in these cases."[204]

As indicated in the discussion below, almost three years after the enactment of this legislation, the Commission's regulations were still fundamentally biased against the employment discrimination complainant, for many of the same reasons recognized by the congressional committees in 1971. In addition, the Commission's interpretations of complainants' substantive and procedural rights were in many respects contrary to the requirements of Title VII.[205]

The Commission regulations in effect in 1975[206] set out detailed steps which aggrieved persons must follow in challenging employment

204. Id. at 423.

205. The Commission maintains that parts of the 1972 Amendments to Title VII "were drafted to accommodate specifically to the" complaint system existing at the time of the enactment of the legislation. "Therefore," the Commission believes, "the basis for the report's conclusion that the system and the rights granted to Federal employees and applicants are contrary to Title VII requirements is difficult to find." Hampton letter, supra note 7.

206. 5 C.F.R. § 713.211 et seq. (1974). The regulations adopted in 1969 were only slightly revised in 1972 following the enactment of the 1972 Amendments to Title VII. 5 C.F.R. § 713.211 et seq., 37 Fed. Reg. 22717 (Oct. 21, 1972). A listing of the revisions made at that time is found in FPM Letter No. 713-17 (Attachment 1), Nov. 3, 1972. For a discussion of the revised complaint regulations, see, Brief for the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund as Amicus Curiae, Laurel v. United States, appeal docketed No. 74-3746, 5th Cir. 1974. Further revisions were made in the regulations in 1974 to include provisions for the processing of complaints alleging discrimination on the basis of age, pursuant to Public Law 93-259 (effective May 1, 1974). FPM Letter 713-28, July 9, 1974.

discrimination in Federal employment.[207] Following an informal process, complaints proceed through formal investigation and a hearing, if requested by the complainant, and are then subject to final decision by the agency head or other designated official. Complainants may file a civil action in U.S. district court after 180 days from the initiation of the complaint or after final agency action. They may also appeal the agency's final decision to the Commission's Appeals Review Board.[208]

These procedures do not apply to general allegations of discrimination unrelated to a specific individual, which are made by an individual complainant or a third party.[209] When complaints are made alleging discrimination against a class, the agency is required only to establish a file and to notify the complainant of its decision, which the complainant may appeal to the Commission within 30 days. There is no requirement that the agency conduct an investigation, nor are any time limits set for agency action.[210] Complainants are not permitted access to the investigatory file until the case is closed, and there is no right of appeal to the Appeals Review Board.[211] Further, the Commission regulations do not acknowledge that

207. Employee complaints alleging improper agency actions on grounds other than race, ethnic, or sex discrimination are processed according to entirely different procedures which provide for a hearing before the Commission, but no right of appeal to the Commission's highest reviewing authority, the Appeals Review Board - 5 C.F.R. § 772. These procedures apply to employees' challenges to adverse actions such as termination, probation, or pay classification. Complainants frequently are faced with having to elect which of these procedures to follow in challenging an adverse action which they believe to be racially or sexually discriminatory.

208. The name of the Board of Appeals and Review was changed in 1974 to the Appeals Review Board.

209. 5 C.F.R. § 713.212(b).

210. 5 C.F.R. § 713.251. There are no procedural requirements governing the conduct of such investigations.

211. FPM Letter No. 713-20 (Jan. 27, 1975).

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complainants raising general allegations have the right to file a civil action in court.[212] During the first quarter of fiscal year 1975, approximately 25 general allegation complaints had been referred to the Commission for review.[213] However, complainants challenging an agency's employment practice, for example, a job requirement which may adversely affect a minority group, may pursue the challenge through the regular complaint procedures.[214] However, when an employment practice required by the Commission is challenged, the complaint may be made in the form of an appeal to the Commission.[215] The Commission has failed to

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212. 5 C.F.R. § 713.281.

213. The Commission did not begin to collect data on the total number of such complaints filed nationally until fiscal year 1975. In the Washington, D.C., area alone, 14 general complaints were reviewed during fiscal year 1974. In only two instances was the agency's decision reversed. In one of these cases, the agency was ordered to establish a Sixteen Point Program. The Sixteen Point Program, now called the Spanish Speaking Program, is discussed on p. 108 infra. In the other instance, the agency was instructed to discontinue requiring a job qualification which was related to a single recruitment source. Interview with Paul Leslie, Chief, Washington Operations Division, Bureau of Personnel Management Evaluations, CSC, Nov. 13, 1974.

214. 5 C.F.R. § 300.104(c).

215. 5 C.F.R. § 300.104(a). An appeal is made to the Appeals Review Board whose decision is final, subject to discretionary review by the Commissioners. 5 C.F.R. § 772.401; 5 C.F.R. § 772.308. In at least two instances, court challenges to the Commission's entrance examinations have been dismissed or remanded for failure of the complainants to exhaust these administrative procedures. Douglas v. Hampton, supra note 121; League of United Latin Am. Citizens v. Hampton, 501 F.2d 843 (D.C. Cir. 1974). To date, there have been few complaints filed with the Commission pursuant to these regulations. See In Re Shirley Long, Appeals Review Board, CSC, Nov. 13, 1972 (finding improper a job requirement by the U.S. Park Police that candidates weigh a minimum of 145 lbs. and have a minimum height of 5'8").

cross-reference these provisions in the standard complaint regulations; thus, many complainants are unaware that they may challenge broad practices in their complaints.[216]

Although Title VII includes no restrictions on the filing of a complaint against a Federal agency, the Commission has imposed stringent conditions.[217] The Commission regulations bar applicants or employees from initiating individual complaints unless an informal complaint is first registered within 30 days of the date on which the allegedly discriminatory act occurred.[218] In addition, the complainant must allege

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216. Interview with Charles Ralston, Attorney, NAACP Legal Defense and Educational Fund, Mar. 20, 1975.

217. The Commission strictly construes the definition of applicant for employment. It has held, for example, that a person who takes a Federal Government basic entry examination but who has not applied for employment at a specific agency is not an applicant with the Civil Service Commission or other agency and, therefore, may not file a complaint. Appeals Review Board Decision in Case No. 713-74-278, Dec. 11, 1973.

218. The current regulations do not contain a provision included in previous regulations which permitted the filing of a complaint at any time if the alleged discrimination was continuing in nature. Compare 5 C.F.R. § 713.213 (1969) with 5 C.F.R. § 713.214 (1972). Title VII complainants may file discrimination charges with the EEOC against private employers or State and local governments within 180 days of the date of the alleged discriminatory act, 42 U.S.C. 2000e-5(e), but the statutory time limitation has been held not to apply in cases charging continuing discrimination. Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232, 1235-6, (N.D. Ga. 1969), rev'd on other grounds, 421 F.2d 888 (5th Cir. 1970). Federal complainants, however, must comply with the Commission's strict time limitations unless they can show good cause for the delay. 5 C.F.R. § 713.214(a)(4). Thus, a Federal complaint was rejected as untimely where a female alleged continuing sex discrimination in promotion practices on the grounds that her complaint was filed 247 days after the most recent denial of promotion to her. Appeals Review Board, Decision in Case No. 713-74-291, Dec. 17, 1973. The Commission's position barring complaints alleging continuing discrimination is squarely in conflict with Title VII law. The Commission believes that "the requirement for timely filing of complaints benefits all parties as it permits a comprehensive investigation of recent events which are still fresh and reconstructible in the witnesses' minds." Hampton letter, supra note 7.

a specific act of discrimination.[219] The complaint is treated informally by an Equal Employment Opportunity Counselor, who is directed to seek resolution of the matter within 21 days. If informal measures fail, the counselor must inform the aggrieved person of the right to file a formal written complaint within 15 days of the notice.[220]

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219. Hampton letter, supra note 7. Despite congressional criticism of the Commission's tendency to view the problem of discrimination as one of individual actions and to ignore systemic discrimination, the Commission, nevertheless, conditions its complaint procedures on the allegation of a specific act of discrimination. See Legislative History, supra note 42, at 423.

220. The Commission maintains that "the great majority of EEO-related issues of concern to employees are resolved informally, and some form of corrective action is taken by the agency as a result of over one-third of these contacts with counselors." Therefore, the Commission believes that this process is "an effective means of resolving problems quickly and informally and substantially reducing the number of issues which need to be processed through the formalized complaint system and the courts." Hampton letter, supra note 7. On the other hand, there may be some question whether complainants are fully informed at this stage of the nature of the discrimination they may have experienced or of the relief to which they may be entitled. Ralston interview, supra note 216.

In the past, from 10 to 11 percent of all informal complaints developed into formal complaints:

	Number of Persons Counseled	Number of Formal Complaints
Fiscal Year 1972	16,883	1,834 (11%)
Fiscal Year 1973	26,627	2,743 (10.3%)
Fiscal Year 1974	31,484	3,435 (10.9%) [221]

The vast majority of formal complaints in each fiscal year alleged race discrimination, followed in frequency by allegations of discrimination on the basis of sex, national origin, and religion.[222]

When a complaint is filed, the head of the agency or designated official may reject any portion of the complaint which is of a general

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221. Memorandum to Irving Kator, Assistant Executive Director, CSC, from Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Aug. 23, 1974. Approximately 35 to 45 percent of the informal complaints were followed by some "corrective action," but not necessarily any specific relief to the complainant. Id. An analysis of corrective actions taken by agencies in fiscal year 1973 found that these measures most frequently consisted of an "improved personnel practice," promotion, reduction or rescission of adverse action, training opportunities, or reassignment. The next most frequently occurring corrective actions were reinstatement, priority consideration for promotion, improved EEO practices, and removal of adverse material from official personnel folders. Telephone interview with Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Nov. 25, 1974.

222. Race discrimination complaints represented 68.4 percent of the total formal complaints in fiscal year 1972, 61 percent in fiscal year 1973, and 60.3 percent in fiscal year 1974. The respective figures for the other bases were as follows: sex-female, 16 percent, 20 percent, 21.7 percent; sex-male, 3.6 percent, 4 percent, 6.3 percent; national origin, 9.1 percent, 10 percent, 9.5 percent; religion, 2.6 percent, 5 percent, 4.3 percent. Hudson memorandum, supra note 221. The Commission's tabulation of complaints did not indicate the number of complaints alleging both sex and race or national origin discrimination.

nature and not related to the individual.[223] In fiscal year 1974, 10 percent of final complaint dispositions reported by agencies were rejections of complaints.[224] The Commission has not issued clear guidelines specifying what types of allegations are "unrelated" to an individual complaint.[225] It has consistently held, however, that complaints alleging discrimination against a particular class of employees, of which the complainant is a member, are not within the purview of the standard complaint procedures.[226] In contrast, class and individual

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223. 5 C.F.R. § 713.215. The complainant may challenge such a rejection by appealing to the Commission or by filing a civil action. Id.

224. Of 2,650 dispositions, 265 were rejections. Hudson memorandum, note 221.

225. The Commission has merely indicated that allegations of discrimination which do not fall within the purview of the regulations are those not filed by an employee or applicant for employment in the agency where the act occurred, do not relate to an employment matter over which the agency has jurisdiction, or are not based on race, color, sex, religion, or national origin. FPM Letter No. 713-213, Sept. 21, 1973. The Commission has indicated that "each complaint must be considered on its own merits. What may be an 'unrelated' allegation in one complaint may well be the core of another complaint." Hampton letter, supra note 7.

226. See, for example, Appeals Review Board, Decision in Case No. 713-74-275, Dec. 10, 1973. The complainant alleged that an agency policy of controlling grade escalation, which applied to only two job classifications, was discriminatory on the basis of sex, since virtually all employees in the two classifications were women. The complainant was an employee in one of the two job categories. Similarly, a Native American employee denied a promotion filed a complaint alleging discrimination against Native Americans in promotions; the class allegation in the complaint was rejected. Appeals Review Board, Decision in Case No. 713-74-289, Dec. 17, 1973. Since the Commission does not permit the regular processing of class-wide complaints, some Federal district courts have held that a class action law suit is barred. See, e.g., Pendleton v. Schlesinger, No. 1689-73 (D.D.C. Aug. 9, 1974). In November 1974, the NAACP Legal Defense and Educational Fund filed a lawsuit challenging the Commission's practice of severing class allegations from individual complaints. Barrett v. United States Civil Serv. Comm'n, Civil No. 75-1694 (D.D.C. Nov. 20, 1974). See also, letter from William P. Berzak, Chairman, Appeals Review Board, to Allen Black, NAACP Legal Defense and Educational Fund, Oct. 18, 1974, which affirmed that the Commission does not permit individuals to include class discrimination allegations in their individual complaints.

discrimination claims under Title VII have historically been treated simultaneously, since the Federal courts have long held that employment discrimination is, by definition, class discrimination.[227] From the complainant's standpoint, severance of class issues from the individual claim in the administrative process can be extremely detrimental because it may preclude collection and introduction of evidence relating to the class which may be highly material to the individual's case.[228]

The rule of rejecting portions of complaints not previously raised also appears to be contrary to the historic treatment of Title VII complaints. Charges before the EEOC have generally been broadened, where appropriate, to encompass like and related issues to the one raised by the charging party.[229] This practice was adopted by EEOC and upheld by the courts on the grounds that victims of employment discrimination most often do not comprehend the complex sources of that discrimination.[230] There is no reason to believe that Federal employees are any different.

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227. See, e.g., Oatis v. Crown Zellerbach, 398 F.2d 496, 499 (5th Cir. 1968); Jenkins v. United Gas Corp. 400 F.2d 28, 33 (5th Cir. 1968).

228. Interview with Roderick Boggs, Federal Employment Project, Washington Lawyers Committee for Civil Rights Under the Law, Mar. 19, 1974. In private employment discrimination cases, statistics showing the relative status of the entire class are relevant to the individual discrimination complaint. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

229. See, e.g., Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

230. See, e.g., Danner v. Phillips Petroleum Co., 447 F.2d 159, 161-2 (5th Cir. 1971). Although matters not expressly raised by the Federal employee in the informal complaint may be rejected from the formal complaint, matters not expressly raised in the formal complaint may be subsequently investigated if they relate to the "work situation." 5 C.F.R. § 713.216(a).

If a complaint is not rejected, it is then the responsibility of the agency's Equal Employment Opportunity Officer to provide for the complaint investigation.[231] Complainants are not given the right to influence the scope or method of the investigation. The regulations do not require that investigators be certified or trained in employment discrimination matters, but only that they be employees from a part of the agency not subordinate to the agency official in charge of the unit in which the complaint arose.[232] Until September 1974, the Commission provided agencies with investigators on a reimbursable basis. Effective September 3, 1974, agencies were required to assign their own staffs to investigations.[233] Thus, despite congressional concern expressed in 1971 that there was an inherent bias in the complaint investigation procedures, Commission regulations still provide that the investigation be conducted by employees of the allegedly discriminatory agency.[234]

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231. 5 C.F.R. § 713.216.

232. Id. Investigators of Federal Title VII complaints may be persons with investigative experience or those who work in occupations requiring investigative skills, such as attorneys, auditors, personnel management specialists, or management analysts. FPM Letter No. 713-34, supra. The Commission provides training for agency investigators, and has proposed a rule which would require certification by the Commission. Hampton letter, supra note 7.

233. FPM Letter No. 713-34, June 1974. However, between September 1973 and April 1975, the Commission conducted 18 investigations on the requests of agencies and between December 1974 and April 1975 assumed jurisdiction of 62 complaint investigations because of undue delay by agencies. Hampton letter, supra note 7. The Commission's policy is to conduct investigations for agencies where there is a potential conflict of interest, publicity or outside interest, or where the agency is small. Id.

234. In 1973, this Commission recommended that the Civil Service Commission reevaluate its regulations providing for investigations by agency personnel, since there were serious questions about the impartiality of such investigators. See, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: A Reassessment 55 (1973). The Commission sees no basis for the statement that there is inherent bias in the investigation process. Hampton letter, supra note 7.

Commission regulations further provide that the investigation include a thorough review of the general work environment in which the complaint arose and a comparison of the "...treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred...."[235] This provision ignores the possibility that the complaint may have arisen in an organizational segment in which there was discriminatory segregation of one class.[236] It further militates against proper analysis of the work force, since the complainant's group is to be compared with the aggregate of all other groups rather than with each separate group.[237] In addition, the term "organizational segment" is not defined to indicate clearly how broad or restricted the investigation should be.

The Commission issued guidelines in 1971 explaining in more detail how complaint investigations are to be conducted.[238] These investigation guidelines suffer from a number of deficiencies, only a few of which

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235. 5 C.F.R. § 713.216.

236. For example, a complaint may arise in an all-female clerical pool or in an all-black mail room. The Commission does not believe this provision to be deficient because the term "organizational segment" may be interpreted very broadly. Hampton letter, supra note 7.

237. An analysis might find, for example, that 40 percent of minorities and 20 percent of nonminorities are concentrated in the lowest four grades. If the complainant is a minority female, the investigation should compare the condition of minority females separately with that of nonminority females, minority males, and nonminority males in order to determine the disparity between the status of minority females, and the other groups. In a typical situation, this analysis would find that 50 percent of minority females, 40 percent of nonminority females, 30 percent of minority males, and 5 percent of nonminority males are concentrated in these grades. Thus, the disparity between the complainant's group and the group with the best status is a difference of 45 percent, rather than 20 percent. For data showing the composition of the work force in the lowest four grades, cross-tabulated by race and sex, see CSC, Manpower Statistics Division, Bureau of Manpower Information Systems, Federal Civilian Personnel Statistics: Federal Civilian Employment by Minority Group and Sex, Nov. 30, 1972.

238. Investigating Complaints of Discrimination in Federal Employment, CSC, Oct. 1971 /hereinafter cited as Investigation Guidelines/.

would be eliminated in revised draft guidelines circulated in November 1974.[239] The most serious deficiency in the current guidelines is their failure to include a correct definition of the meaning of discrimination. The guidelines implicitly adopt a definition limiting discrimination to overt acts or patterns of "unfair treatment."[240] The guidelines in draft stage in 1974 did not correct this deficiency,[241] despite the well established rule under Title VII that illegal discrimination includes not only disparate or unfair treatment, but also neutral treatment which had a disparate effect on any ethnic, racial, or sex group, unless justified by some compelling, nondiscriminatory purpose.[242]

Second, the guidelines generally limit the scope of the investigation to the actions and decisions of the allegedly discriminatory agency official and to the organizational segment in which the complaint arose.[243] The proposed new guidelines would permit extending the investi-

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239. Draft Investigation Guidelines (undated), provided by Mr. Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Nov. 1, 1974 /hereinafter cited as Draft Investigation Guidelines/.

240. The current guidelines state that the investigation should be sufficiently comprehensive to uncover any evidence of overt discrimination and should develop enough information to bring out...any pattern of nonselection or unfair treatment of members of the complainant's group which might constitute evidence of discrimination...." Investigation Guidelines, supra note 238, at 5.

241. The draft guidelines state that "A pattern of discrimination is established by evidence which shows disparate treatment of members of the complainant's group when compared with the treatment of members of other groups." Draft Investigation Guidelines, supra note 239, at 29-30.

242. Griggs v. Duke Power Co., supra note 114.

243. Investigation Guidelines, supra note 238, at 9. This limitation can operate severely to the disadvantage of the complainant, since statistical evidence based on the agency as a whole has been held to be highly material to an individual's case. See, for example, Robinson v. Warner, No. 1654-23 (D.D.C., June 24, 1974) in which the court supplemented the administrative record with statistical evidence based on the entire Navy Command Systems Support Activity and reversed the agency's final determination of nondiscrimination.

gation to other units under the same administrative jurisdiction but not to the agency as a whole.[244]

Third, the guidelines on investigating complaints arising in the selection or promotion process fail to include essential instructions on investigating a personnel action. The guidelines merely instruct the investigator to list the name, sex, race, or ethnicity of each of the candidates and their relative ranking. There are no instructions to investigate the possibility of systemic discrimination in the ranking itself or in the process by which candidates were placed on the certificate list of eligibles.[245] The proposed new guidelines indicate that the investigator should "...consider the need for looking into the reasons why the complainant did not appear on the certificate or was not rated high enough to be within reach on the certificate,"[246] but they do not

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244. Draft Investigation Guidelines, supra note 239, at 30.

245. Investigation Guidelines, supra note 238, at 15-17. The failure to include such an analysis in an investigation can seriously injure the complainant. For example, a black female who was the only black in her division and who had been passed over for promotion three times and for training opportunities two times was held not to have been subjected to race discrimination on the grounds that the selection panel's decision was based on "documentary appraisals and evaluations" and the personal knowledge of the candidates by the three panel members, two supervisors and the selecting official. Appeals Review Board, Decision in Case No. 713-74-284, Dec. 13, 1973. Race discrimination can easily occur in supervisors' appraisals of employees. See, e.g., Rowe v. General Motors, 457 F.2d 348 (5th Cir. 1972). Yet, the Commission made the decision in the above case without any indication that an investigation had been made of the evaluations and ratings given black applicants and employees by the agency. The Commission maintains, however, that the procedures for investigating promotion actions are adequate because they determine how and why each candidate is ranked. Hampton letter, supra note 7.

246. Draft Investigation Guidelines, supra note 239, at 11.

include instructions on the method by which this investigation should be conducted.[247] Neither the current nor proposed guidelines contain any instructions concerning the investigation of qualification standards which may have had an illegally discriminatory effect on the complainant.[248]

Finally, both sets of investigation guidelines suffer from extreme vagueness. For example, both instruct the investigator to determine whether there exists "...any improper segregation of personnel by reason of their membership in the group alleged to have been discriminated against,"[249] but there is no explanation of the meaning of the term "improper." Similarly, the investigator is instructed to collect "information about the agency's merit promotion plan and procedures, if needed for an understanding of the case."[250] However, there are no criteria included for determining the relevance of such information, or for evaluating a merit promotion system to determine compliance with the dictates of Title VII.

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247. Id. at 39-43.

248. In reviewing individual complaints, the Commission does not consider the job relatedness of a particular selection standard which rejected the complainant. The draft guidelines propose to prohibit the inclusion in the investigative file of any Commission Job Element Guides or rating schedules. Id. at 15. This information could be essential to challenging the job relatedness of a qualification standard.

249. Investigation Guidelines, supra note 238, at 10; Draft Investigation Guidelines, supra note 239, at 31.

250. Investigation Guidelines, supra note 238, at 17; Draft Investigation Guidelines, supra note 239, at 42.

The new guidelines in draft stage as of November 1974 contained two distinct improvements over the current guidelines in that they emphasized the importance of the investigator's maintaining independence from the agency's officials[251] and that they permitted the investigator to collect information relevant to a basis of discrimination other than that charged by the complainant.[252] The revisions to the 1971 version of the Guidelines were prepared without consulting with EEOC,[253] despite a clear request from Congress in 1972 that the Commission obtain EEOC's advice on equal employment matters.[254]

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251. Draft Investigation Guidelines, supra note 239, at 12. The draft guidelines would prohibit specifically, for example, the disclosure of the investigative file to these officials during the investigation. Id.

252. Id. at 26. Permitting this flexibility to the investigator is important, since it is not uncommon for a complainant to allege one basis of discrimination, e.g., sex discrimination, when in fact she or he may be the victim of race or ethnic discrimination as well.

253. Hudson telephone interview, supra note 221. The Commission consulted with representatives from agency internal EEO programs, including representatives from EEOC. However, the Commission did not consult with the EEOC Office of Compliance. Hampton letter, supra note 7.

254. Legislative History, supra note 42, at 425. The Commission's staff indicated that EEOC was not consulted concerning the revision because the Commission perceived that the two agencies had basic differences in approach to investigations. According to the Commission's staff, Federal complaint investigators are to look for evidence that individuals received disparate treatment; the Commission's staff felt that EEOC investigations were directed primarily to collecting statistical evidence on the class as a whole. Hudson telephone interview, supra note 221. For a discussion of EEOC investigations, see Chapter V infra. EEOC investigations, in fact, appear to entail collection of both types of information. There is a strong reason to believe that Congress intended that the basic approach of the Commission be more like that of EEOC in all matters and that the Commission utilize the reservoir of talent and expertise available within the EEOC for improving Federal complaint and other equal employment programs. Legislative History, supra note 42, at 425.

Commission regulations require the agency to make a second attempt to resolve the complaint informally following the completion of the investigation.[255] If an adjustment of the complaint is not obtained, the complainant is to be notified of the proposed disposition by the agency and of the right to request a hearing within 15 days of the notification.[256] In fiscal year 1974, slightly less than 25 percent of the complainants whose cases were decided had requested and received a hearing.[257]

Hearings are closed proceedings conducted by a complaints examiner,[258] who is certified by the Commission and who must be an employee[259]

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255. 5 C.F.R. § 713.217(a). The complainant is entitled to review the investigation file.

256. 5 C.F.R. § 713.217(b).

257. Hearings were held in 643 of the 2,650 cases which received final dispositions during fiscal year 1974. Hudson memorandum, supra note 221; Hudson telephone interview, supra note 221.

258. Only persons directly connected with the complaint may attend. 5 C.F.R. § 713.218(c)(1). However, the allegedly discriminatory official is not entitled to be present. Discrimination Complaints Examiners Handbook, Office of Federal Equal Employment Opportunity, Apr. 1973, at 36.

259. 5 C.F.R. § 713.218(a). Complaints examiners must meet the qualifications established in the Commission's GS-930 (Hearings and Appeals) Series, which is applicable to most hearing officer positions not subject to the Administrative Procedure Act. A law degree is not required but may substitute for work experience in adjudicating cases. Expertise in Title VII law or employment discrimination matters is not required. Memorandum to J. Philip Bohart, Acting Director, Personnel and Labor Relations Division, from H. Alan McKean, Chief, Standards Division, Apr. 1, 1974. This certification standard was adopted in conjunction with a reorganization of the employee appeals system within the Commission and the establishment of the Federal Employee Appeals Authority. The reorganization primarily affected the system through which employees appeal adverse personnel actions and did not change any of the appeal provisions pertaining to discrimination complaints. CSC, New Federal Employee Appeals System (undated).

from another agency except in unusual circumstances.[260] The complainant has the right to be represented by counsel[261] and to cross examine witnesses but not the right to obtain information other than that collected by the agency or to subpoena documents or witnesses.[262] The hearing is not to be an adversarial proceeding but rather an extension of the investigation.[263]

To assist complaints examiners, the Commission issued an examiner's handbook in April 1973, which gives instructions on preparing for and conducting a hearing, admitting and evaluating evidence, and writing recommended decisions.[264] Although the Discrimination Complaints

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260. Where an agency is prevented by law from disclosing to persons without security clearances information concerning the matter complained of, the complaints examiner may be an employee of the agency. 5 C.F.R. § 713.218(a).

261. With respect to representation by counsel, the Commission on Civil Rights recommended in 1970 that free legal assistance be provided on request to all employees who require it. Enforcement Effort report, supra note 147, at 358. The Civil Service Commission has not implemented such a program in the ensuing 5 years.

262. The complaints examiner has the authority to require agencies to produce witnesses requested by the complainant when the complaints examiner determines that the testimony is "necessary" and where it is not "administratively impracticable" for the agency to comply with the request. 5 C.F.R. § 713.218(e). Both the agency and the complainant have the right to submit evidence in the form of documents, affidavits, or testimony of witnesses. Discrimination Complaints Examiner Handbook, supra note 258, at 85, 87. The complainant may also request that the examiner request evidence or testimony. If the examiner denies the request, reasons must be given in the record.

263. Discrimination Complaints Examiners Handbook, supra note 258, at 5. See also, letter from Robert E. Hampton, Chairman, CSC, to Arthur F. Sampson, Acting Administrator, General Services Administration, June 18, 1973.

264. Id.

Examiners Handbook was issued more than a year after Title VII became applicable to Federal employment, it contains no guidelines or information on substantive Title VII law.[265] In addition, the Handbook's instruction concerning the meaning of discrimination and questions of burden of proof are contrary to the weight of authority under Title VII. The Handbook describes discrimination exclusively in terms of disparate treatment[266] and provides that complainants have the initial burden to present evidence of disparate treatment. The weight of Title VII law, however, does not place the burden on plaintiffs to show disparate treatment; instead, plaintiffs are held to make out a prima facie case of illegal discrimination by presenting statistical evidence showing a disparity in the employment status of the alleged discriminatees and other employees.[267] The Commission's handbook does not indicate that Federal Title VII complainants have access to this procedure in the context of the administrative hearing.[268] If the record establishes that disparate treatment has occurred, then the examiner is instructed to view the evidence most favorably to the agency and to make a finding of discrimination if a reasonable mind could not infer from the evidence so viewed that the agency's action was free from discrimination on the basis of race, color, sex, religion,

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265. The Commission does, however, provide a digest of Title VII cases for complaints examiners. Hampton letter, supra note 7.

266. Id. at 57, 62. As noted on p. 72 supra, Title VII reaches not only disparate treatment but neutral treatment which has a disparate impact.

267. See e.g., McDonnell Douglas Corp. v. Green, supra note 228; Rowe v. General Motors Corp., supra note 245; Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

268. Complaints examiners frequently exclude evidence proffered to show discrimination against the complainant's class and such actions are routinely affirmed by the Appeals Review Board. See e.g., Appeals Review Board Decision in Case No. 713-73-593 (June 14, 1973).

or national origin.[269] In short, the instructions lead a reasonable person to believe that the complaints examiner is instructed to apply a standard which gives the benefit of the doubt to the allegedly discriminatory agency.

The findings and recommendations of the complaints examiner are not binding on the agency unless the examiner recommends a finding of discrimination and the agency has not issued a final decision within 180 days after the complaint was filed.[270] If the agency rejects or modifies the decision recommended by the complaints examiner, or if the agency's decision is made when a hearing is not requested, it must set forth the specific reasons for its final action.[271] During fiscal year 1974, 7 percent of final agency dispositions made a finding of discrimination.[272]

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269. Discrimination Complaints Examiners Handbook, supra note 258, at 62. The Handbook states as follows:

> Where the record shows disparate treatment, the Examiner must then evaluate the evidence and assemble the facts which tend to establish a case free from discrimination based on the complainant's race, color, religion, sex, or national origin. If a reasonable and unprejudiced mind could not infer from the facts so assembled that the agency was free from discrimination in the matter, then the Examiner should make a finding of discrimination. Id.

270. 5 C.F.R. § 713.220(d); § 713.221(b).

271. 5 C.F.R. § 713.221. However, the Commission has held that an agency's failure to provide specific reasons for its action does not invalidate the decision if the ARB provides reasons in its review. Minutes of Civil Service Commission, Feb. 27, 1974, declining to reopen Appeals Review Board Decisions Nos. 713-73-595, 713-74-179, and 713-74-43.

272. A finding of discrimination was made in 170 of 2,650 dispositions. Hudson memorandum, supra note 221. Final dispositions include rejections or cancellations of complaints. Findings of discrimination constituted 12.8 percent of all decisions on the merits. Complaints examiners made findings of discrimination more frequently than did agencies. In the 643 cases which went to a hearing, complaints examiners recommended a finding of discrimination in 109 (16.9 percent) cases. Agencies adopted contrary findings in 26.6 percent of these cases. CSC, Office of Federal Equal Employment Opportunity, Performance by Agency and CSC Complaints Examiners in EEO Discrimination Complaint Cases During FY 1974 (undated).

Commission regulations require that agencies proceed with the processing of complaints without "undue delay" so that complaints are resolved within 180 days after filing, including time consumed by a hearing.[273] However, in fiscal year 1974, the Government-wide average time spent processing a complaint was 201 days, which was 26 days longer than that of fiscal year 1973.[274] Some major agency complaint processing procedures averaged well over 300 days.[275]

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273. 5 C.F.R. § 713.220.

274. Memorandum to Irving Kator, Assistant Executive Director, CSC, from Anthony Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Precomplaint Counseling and Discrimination Complaint Activity During Fiscal Year 1974, Aug. 23, 1974. Agencies whose average complaint processing time in fiscal year 1974 exceeded 180 days were as follows: Department of Agriculture (214 days); Department of the Army (211 days); Atomic Energy Commission (317 days); Department of Commerce (256 days); Defense Contract Audit Agency (307 days); Defense Supply Agency (211 days); Environmental Protection Agency (259 days); Equal Employment Opportunity Commission (296 days) Federal Communications Commission (856 days); General Services Administration (212 days); Department of Health, Education and Welfare (367 days); Department of Housing and Urban Development (369 days); Department of the Interior (197 days); Department of Justice (250 days); Department of Labor (253 days); National Aeronautics and Space Administration (254 days); National Labor Relations Board (296 days); Selective Service System (370 days); Small Business Administration (252 days); Department of Transportation (395 days); U.S. Information Agency (238 days); and U.S. Postal Service (189 days). Agencies whose average complaint processing time in fiscal year 1974 met the 180-day limit were as follows: Administrative Office of U.S. Courts, U.S. Air Force, Army and Air Force Exchange, Civil Service Commission, Commission on Civil Rights, Federal Maritime Commission, General Accounting Office, Government Printing Office, National Guard Bureau, National Science Foundation, Department of the Navy, Office of Management and Budget, Smithsonian, Department of State, Tennessee Valley Authority, Department of the Treasury, and Veterans Administration. During fiscal year 1974, there were no complaints filed against ACTION, Agency for International Development, Civil Aeronautics Board, Defense Communications Agency, Defense Intelligence Agency, Defense Mapping Agency, Defense Nuclear Agency, Federal Power Commission, National Gallery of Art, National Mediation Board, National Security Agency, Office of Economic Opportunity, or U.S. Soldiers Home. Id.

275. See, for example, HEW, HUD, DOT, cited in note 275 supra.

Title VII authorizes the Federal complainant to file a civil action in U.S. district court if the agency does not make a decision within 180 days or within 30 days of the final agency action.[276] A complainant may delay civil action by appealing to the Commission's Appeals Review Board[277] for a review of the record.[278] In fiscal year 1974, approximately 30 percent of agencies' final dispositions of complaints were appealed to the Appeals Review Board.[279] In approximately 75 percent of these cases, the agency decision finding no

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276. 42 U.S.C. § 2000e-16c. A civil action may be filed within 30 days after final agency action or final action by the Commission if the complainant elects to appeal to the Commission.

277. The Appeals Review Board, formerly called the Board of Appeals and Review, consists of nine members appointed by the Chairman of the Commission. Board members are career civil servants who serve at the pleasure of the Chairman. As of November 1974, the Board consisted of 6 anglo males, 1 black male, 1 Spanish surnamed male, and 1 black female. The Board members, all of whom are attorneys, are assisted by a staff of 21 examiners and 15 clerical workers. None of the staff or Board members, as of November 1974, had had any previous experience in Title VII law. Interview with William Berzak, Chairman, Appeals Review Board, Nov. 7, 1974.

278. There is no right to a hearing before the Board, although it will receive written arguments in addition to the record compiled below. 5 C.F.R. § 713.234; Berzak interview, supra note 277.

279. 808 of the 2,650 final dispositions were appealed to the Board during fiscal year 1974. Appeals Review Board, Receipts and Production: EEO Appeals (Oct. 26, 1974).

discrimination or rejecting the complaint was affirmed.[280] In slightly more than 10 percent of the cases, the Board remanded the complaint to the agency for further investigation,[281] and in approximately 7 percent the appeal was cancelled by the complainant.[282] The Board reversed agencies' rejections of complaints and findings of no discrimination in 5.5 percent of the total decisions rendered.[283]

The Board reviews the record to determine if it shows that the complainant was subjected to disparate treatment.[284] It does not consider discrimination in the form of disparate impact. If disparate treatment is shown, the burden is then shifted to the agency to come forward with evidence

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280. 575 of 778 Board decisions affirmed agencies' decisions finding no discrimination or rejecting the complaint. In fiscal year 1973, 585 of 692 Board decisions (or 84.5 percent) affirmed agencies' decisions. Appeals Review Board, Receipts and Production, supra note 279.

281. 82 of 778 Board decisions were in this category. In fiscal year 1973, only 3.6 percent of Board decisions (25 of 692) remanded cases to agencies. Id.

282. Id. In 1973, only 1.4 percent of Board final dispositions were the result of cancellations by complainants.

283. Id. In an additional two percent of the decisions, the Board recommended that further corrective action be taken by agencies. The remaining decisions reversed agency decisions on the grounds that improper procedures had been followed (.8 percent) or rejected the appeal as untimely (.5 percent).

284. The Board's definition of "disparate treatment" appears to be extremely narrow. It has held, for example, that "favoritism" is not a form of discrimination prohibited by law or regulations. Appeals Review Board Decision in Case No. 713-74-285, Dec. 17, 1973, wherein the complainant alleged that supervisors showed favoritism to white employees.

that the treatment was justified by some lawful purpose, such as Commission or agency qualification standards. An agency's decision finding no discrimination will be upheld if the evidence in the record supports the conclusion that the disparate treatment was justified.[285] The Board does not follow or refer to judicial decisions interpreting the substantive or procedural requirements of Title VII, nor does it follow the rule of stare decisis with regard to its own prior decisions.[286]

Although it is well settled under Title VII law that the complainant need not show direct proof of intentional discrimination and that a statistical disparity shifts the burden to the employer to show evidence of non-discrimination, the Board does not apply this standard. In one case decided in 1973, the Board correctly followed this standard but was reversed by the Commission.[287]

The 1972 Amendments to Title VII gave the Commission express authority to order reinstatement, back pay, and other relief to persons found to be victims of discrimination.[288] Commission regulations provide

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285. Telephone interview with William Berzak, Chairman, Appeals Review Board, CSC, Nov. 27, 1974. If, however, the record is not sufficiently complete, the Board may remand the case or conduct an independent review.

286. The decisions of the Appeals Review Board are largely ad hoc dispositions which do not refer to prior decisions of the Commission or any substantive rules of law. The Commission does not publish these decisions but merely makes them available at headquarters and certain regional offices.

287. Minutes of the Civil Service Commission, Nov. 14, 1973, reversing Appeals Review Board Decision No. 713-73-465.

288. 42 U.S.C. § 2000e-16(b).

that a person denied employment or promotion shall be given priority consideration for any existing vacancy where the record shows that discrimination existed when the selection was made.[289] However, such persons are not entitled to back pay or other retroactive relief unless the record shows that the person would have been selected but for the impermissible discrimination.[290] The Commission's rule, which places a heavy burden of proof on complainants seeking retroactive relief, is completely contrary to the weight of Title VII case law, which holds that once discrimination has been found, the employer has the burden of showing that the victim would not have been selected even in the absence of the illegal discrimination.[291] As a result of the Commission's restrictive interpretation of the

289. 5 C.F.R. § 713.271.

290. Id. Thus, the Commission has held that where sex discrimination was found in the denial of a promotion to a female complainant, she was not entitled to retroactive relief, even though she was the top ranked candidate for the position, on the grounds that she might have been denied the promotion on grounds other than sex, since hiring officials have some limited discretion. Appeals Review Board, Decision in Case No. 713-74-437, Mar. 14, 1974. Similarly, where racial discrimination was found in the ratings made by a promotion panel, the black complainant, who was ranked second best, was not given back pay or other retroactive relief, since the record did not show that but for the ratings, the complainant would have been selected. Appeals Review Board, Decision in Case No. 713-74-277, Dec. 10, 1973.

291. See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). In late 1974, a Federal district court ruled that the Commission's standard on retroactive relief was improper. Day v. Weinberger, No. 74-292 (D.D.C. Nov. 4, 1974). The Commission maintains that its position comports with a decision by the Court of Claims in 1971, Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971). Hampton letter, supra note 7. However, the district court in Day v. Weinburger specifically noted that the Chambers decision was no longer applicable because it was rendered prior to the passage of the 1972 amendments to Title VII.

remedial authority it has been given in Title VII, full relief is rarely provided to discriminatees. In fiscal year 1973, retroactive relief was provided in 22 (or 3 percent) of 778 cases in which action was taken to correct discrimination.[292]

Thus, it is clear that Federal Title VII complainants face severe disadvantages throughout the complaint process. The allegedly discriminatory agency not only has control over the content of the complaint's allegations but over the investigation as well. While the complainant has a right to a hearing before an independent examiner,[293] the complainant's rights are limited in that proceeding, and the finding of the hearing examiner is not binding on the agency in most cases. The final decision made by the allegedly discriminatory agency is appealable to the Commission, but is not subject to a review according to Title VII case law. More importantly, the substantive rights guaranteed under Title VII, as well as important Title VII evidentiary and procedural rules, are not available to the Federal complainant. Finally, when a civil action is filed in court, the complainant may well not be

292. Hudson telephone interview, supra note 221. Hampton letter, supra note 7.

293. Since complaints examiners are paid by the allegedly discriminatory agency, an argument could be made that the examiners are not totally independent. Discrimination Complaints Examiners Handbook, supra note 258. The Commission emphasizes, however, that the examiner is referred by the Federal Employee Appeals Authority which is reimbursed by the agency for the examiner's service. Thus, the examiner is not paid directly by the agency. Hampton letter, supra note 7.

given a full trial, but only a review of the administrative record.[294] Three years after the passage of the 1972 Act, it did not appear that the extension of Title VII to Federal employment had led to any meaningful changes in the handling of complaints or the substantive rights of Federal employees to be free from discrimination.[295]

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294. As of April 1975, the courts were divided on the question of whether Section 717(c) of Title VII, as amended, 42 U.S.C. § 2000e-16(c), gives Federal employees the right to a trial de novo or only to a review of the administrative record. See, e.g., Sperling v. United States, No. 79-1533 (3rd Cir. Apr. 18, 1975); Henderson v. Defense Contract Servs. Administration, 370 F. Supp. 180 (S.D.N.Y. 1973) (holding that a right to a trial de novo exists). Contra Salone v. United States, No. 74-1975 (10th Cir. Feb. 21, 1975); Hackley v. Johnson, 360 F. Supp. 1247 (D.D.C. 1973), Appeal docketed, No. 73-2072, D.C. Cir. Oct. 17, 1973.

295. The Commission maintains that it is incorrect to state that complainants face severe disadvantages throughout its procedures. "The rights of the complainant," the Commission maintains, "are fully safeguarded and the Commission standards are in fact more favorable to the complainant than is required by the courts under Title VII proceedings in the private sector." Hampton letter, supra note 7. In addition, the Commission emphasizes that no Federal court has yet found the procedures inconsistent with Title VII. Id.

Chapter 1

FINDINGS AND CONCLUSIONS

Civil Service Commission (CSC)

1. The United States Civil Service Commission oversees and sets standards governing the civilian personnel practices of the Federal Government, which employs nearly four percent of the Nation's work force. Title VII of the 1964 Civil Rights Act, as amended in 1972, prohibits Federal agencies and departments from discriminating against applicants or employees on the basis of race, color, religion, sex, or national origin. Under Title VII the Commission is responsible for ensuring that Federal employment practices are nondiscriminatory and for reviewing agency affirmative action plans on an annual basis. In addition, the Commission has been charged with enforcing Executive orders since 1965, which require agencies to maintain complaint procedures as well as nondiscriminatory practices.

2. It is the position of the Commission on Civil Rights that the Federal Government should be bound by the same standards on equal employment opportunity and affirmative action as govern the practices of all other employers. However, CSC maintains that it is not required to adhere to the Title VII guidelines established by the Equal Employment Opportunity Commission (EEOC) for all other employers or to follow the affirmative action principles applicable to employers who are Federal contractors.

3. Although Congress expressed deep concern in 1972 that many of the civil service employee selection standards appeared to be discriminatory, the Commission has failed to carry out its responsibility under Title VII

to demonstrate empirically that all Federal examination procedures having an adverse impact on minorities and women are manifestly related to job performance.

a. The Commission has adopted guidelines for demonstrating the job relatedness of examination procedures which are substantially weaker than the guidelines of the Equal Employment Opportunity Commission. The Supreme Court in 1971 gave great deference to the EEOC guidelines, which are applicable to private employers, as well as State and local governments.

b. To screen applicants for entry into major professional and administrative positions, the Commission has developed a new examination, the Professional and Administrative Career Examination (PACE), which has not been demonstrated empirically to be related to job performance or to lack cultural and/or sex bias.

c. The Commission has failed to conduct a systematic analysis to determine if its procedures for evaluating and ranking candidates on the basis of biographical information are discriminatory or to show empirically that such procedures are job related. A study conducted by the General Accounting Office in 1973 included substantial evidence that these procedures were not reliable indicators of job performance.

d. Federal law prohibits hiring officials from considering any candidates other than the top three ranked individuals when hiring from outside the civil service. This "rule of three" is required by statute. Available evidence indicates that CSC's ranking procedures are not reliable indicators of successful job performance and may, in fact, screen out qualified candidates. Nevertheless, the Commission has failed to recommend to Congress that the "rule of three" be modified to permit consideration of all qualified candidates.

e. The Commission has failed to make recommendations to Congress with regard to modifying the requirement that veterans be given preference in selection, although this provision has a clearly discriminatory impact on women.

f. CSC prohibits agencies from making race, sex, or ethnicity a criterion for selection of candidates even when agencies are attempting to adhere to affirmative action goals to eliminate the vestiges of prior discrimination.

4. The Commission's regulations governing complaint procedures to be maintained by agencies deny Federal employees a full and fair consideration of their employment discrimination grievances. The deficiencies in the Commission's previous regulations which were criticized by Congress in 1972 persist in the regulations in effect in early 1975.

a. Strict time limitations imposed on complainants at each stage of the process, as well as other prerequisites, pose serious barriers to Federal employees in bringing complaints. These barriers are not faced by employees who file discrimination charges before the Equal Employment Opportunity Commission.

b. Complainants alleging a pattern or practice of discrimination or discrimination on a classwide basis are not guaranteed the right to a hearing or expeditious investigation.

c. The agency charged with discrimination has the principal control over the framing of complaints, the investigation, and the final decision on complaints brought by their employees or applicants.

d. The Commission's instructions on complaint investigations suffer from a number of significant deficiencies, including the failure to

define discrimination according to Title VII law and to provide adequate guidance on detecting discrimination in the selection process. The guidelines do not provide that complaint investigations consider whether general personnel practices have had a disproportionately adverse impact on the complainant's group. New guidelines in draft stage as of November 1974 would not correct most of the deficiencies in the current instructions.

e. Complainants alleging an individual act of discrimination are given the opportunity to have a hearing, but the hearing provided for in the Commission's regulations is not considered by the Commission to be an adversarial proceeding. Neither substantive nor procedural Title VII law is required to be applied. For example, Title VII case precedent, which holds that statistical evidence of disparities constitutes a prima facie violation of the Act, is not followed in these proceedings. In addition, the complaints examiner is instructed to apply a standard in making a determination which gives the benefit of the doubt to the allegedly discriminatory agency. Moreover, the examiner's determination is merely a recommendation to the accused agency, which has the authority to make the final determination, subject to limited review by the Commission's Appeals Review Board (ARB) and discretionary review by the Commission.

f. The Appeals Review Board, in issuing decisions on employment discrimination matters, has not followed the substantive Title VII law and, in some cases, has adopted interpretations of law inconsistent with Title VII.

g. Although Title VII provides Federal complainants the right to file a civil action in Federal district court, a number of courts have limited this proceeding to a review of the administrative record, while other courts have permitted Federal plaintiffs a trial de novo.

h. Although the 1972 Amendments to Title VII gave the Commission additional authority to provide retroactive relief to victims of discrimination, such relief appears to be provided in only three percent of the instances in which action is taken to correct discrimination.

5. The Commission's guidelines on agency affirmative action plans are deficient and clearly inferior to similar procedures applicable under Executive Order 11246, as amended, to private employers which are Government contractors. In addition, the Commission's reviews of agency affirmative action plans are inadequate.

a. The Commission's affirmative action guidelines fail to require agencies to conduct adequate analyses for determining if underutilization of minorities and women exists in their work forces, although such a requirement is expected of all Federal contractors under Executive Order 11246.

b. In contrast to Government contractors, Federal agencies are not required to establish goals and timetables for eliminating underutilization of minorities and women. Although the Commission's statistics indicate that serious underutilization of these groups exists in the higher-level positions at most agencies, few voluntarily set goals and timetables for eliminating these disparities. The Commission has failed to issue adequate instructions on the proper development of goals and timetables. Agencies which voluntarily establish objectives appear to set them so low as to preclude the agency from ever eliminating the underutilization which it has identified. At least one agency established a hiring goal which led to a decrease in the percentage of the class whose employment the agency had intended to increase.

c. The Commission fails to require adequate reporting on the effects of affirmative action measures on the employment of minorities and women; as a result, there is little, if any, evidence that affirmative action plans are accomplishing meaningful improvement in the status of these groups.

d. Many agencies fail to submit their affirmative action plans within the time required by the Commission, as well as fail to adhere to the Commission's instructions on conducting assessments of equal opportunity deficiencies. Of 17 national affirmative action plans reviewed, none included adequate assessments. Nevertheless, the Commission approved the vast majority of these plans without ordering any corrective revisions.

6. The Commission is responsible for conducting periodic reviews of agency employment practices to determine compliance with all applicable laws and regulations, including merit system requirements and Title VII. This evaluation program suffers from a number of deficiencies.

a. The Commission evaluates no more than 15 percent of all Government installations per year.

b. The Commission's guidelines for staff conducting evaluations are inadequate. These guidelines do not give instructions for systematic investigation to determine if agency hiring, placement, and promotion practices have a disproportionately adverse impact on minorities and women.

c. A review of reports on 13 such evaluations found that the Commission routinely fails to consider patterns and practices which may constitute systemic discrimination. In addition, when the Commission found discriminatory practices, it failed to order the agency to provide relief to the victims of such discrimination, despite specific authorization to do so in Title VII.

Chapter 1

RECOMMENDATIONS

Civil Service Commission

We recommend that the President issue an Executive order directing the Civil Service Commission, within six months, to change its current operations to ensure that the Federal Government adheres to the same equal opportunity and affirmative action standards as are applicable to other employers. The Executive order should state that in implementing the recommendations set forth below the Commission's actions will be subject to the approval of the Equal Employment Opportunity Commission (EEOC).

1. The Commission should take steps to ensure that all employee selection methods used by the Federal Government conform to Title VII standards, as delineated by the Equal Employment Opportunity Commission.

a. The Commission should begin immediately to conduct analyses of all Federal selection procedures having an adverse impact on women and minorities to determine whether the standards applied for hiring, placement, and promotion can be demonstrated empirically to be related to job performance and to lack cultural and/or sex bias. Further, even if discriminatory standards are shown to have empirical validity, they must not be used unless the Commission demonstrates that less discriminatory selection standards are inapplicable.

b. The Commission should undertake this analysis in coordination with the Equal Employment Opportunity Commission and independent experts in the field of selection standards validation. The Commission should make public all reports of its analyses.

c. The Commission should recommend to Congress legislation to remove any limitations on its ability to eliminate discriminatory selection standards.

(1) The Commission should recommend to Congress the

serious modification in the law requiring preferential treatment of veterans needed to reduce its extremely discriminatory effect on women by providing that veterans preference in Federal employment be available to individuals on a one-time basis only within five years after discharge from the service.

(2) The Commission should recommend to Congress elimination of the "rule of three," to permit hiring officials to select from a wider range of candidates, since current ranking and testing procedures are unreliable and may unjustifiably screen out qualified minorities and women.

d. The Commission should adopt rules permitting agencies to make race, ethnicity, or sex a criterion of selection when hiring or promoting individuals in accordance with an affirmative action plan designed to eliminate underutilization of minorities and women. Underutilization shall be considered resolved at the point at which there is representation equivalent to the numbers in the available work force.

2. The Commission should issue completely revised complaint procedures which provide Federal employees charging discrimination a full and fair proceeding consistent with Title VII standards.

a. The Commission should adopt the same procedures governing the filing of charges as those used by EEOC, allowing complainants to allege continuing discrimination, providing for less strict time limitations, and treating within the scope of the initial complaint all issues like and related to the specific allegation made by the individual.

b. All complaints should be processed according to the same procedures, regardless of whether they allege a particular act of discrimination or systemic discrimination against an individual or a class.

c. The informal counseling period should be made optional, since it serves to delay the formal proceeding.

d. The Commission should provide on request free legal assistance to complainants of all grades.

e. All investigations should be conducted by an independent office within the Commission according to investigation procedures consistent with Title VII standards.

(1) The Commission should establish an office of investigations with investigators trained in employment discrimination matters.

(2) The Commission should adopt investigation procedures designed to cover all forms of discrimination, including employment practices which have a disparate impact on minorities and women. In establishing these procedures, the Commission should consult with the EEOC and the Wage and Hour Division of the Department of Labor.

f. Complainants should be given the right to obtain all information relevant to the complaint or relevant to the obtaining of information bearing on the complaint. The standard of relevance should be that contained in Rule 26 of the Federal Rules of Civil Procedure. Agency denials of requests for information should be appealable to hearing examiners.

g. All hearings should be conducted before independent hearing examiners according to procedures adequate for protecting Title VII rights.

(1) Certification of hearing examiners should be based on demonstrated expertise in Title VII law.

(2) Hearing examiners should be reimbursed by the Commission rather than by the accused agency.

(3) Complainants should be given the right to subpoena witnesses and documentary evidence.

(4) Any agency official accused in a complaint should be given the right to participate in the proceeding on the complaint as a party in interest.

(5) While strict rules of evidence should not be applied so as to handicap complainants unskilled in the law, nevertheless, all evidence which would be admissible in a court of law considering a Title VII case should be admitted in the administrative hearing.

(6) Substantive Title VII law, as defined by the Federal courts, should be required to be followed.

h. Decisions of hearing examiners should be binding on the accused agency unless reversed by the Appeals Review Board.

i. The Appeals Review Board should apply Title VII precedents in reviewing appeals.

j. The Commission should recommend to the Department of Justice that the Federal Government as defendant in Title VII actions take the position that plaintiffs are entitled to a trial de novo.

3. The Commission should adopt affirmative action regulations modeled after Revised Order No. 4 of the Office of Federal Contract Compliance (OFCC) of the Department of Labor so that Federal agencies are required to adhere to affirmative action standards equivalent to those expected of Federal contractors.

a. Agencies should be required annually to conduct thorough analyses of their work forces to identify disparities between the employment of women and minorities in each agency job title and the availability of these groups in the labor market with job-related qualifications. Such analyses should consider each major minority group (for example, blacks, Mexican Americans, Puerto Ricans, Asians, and Native Americans) separately and by sex, as well as nonminority women.

b. Agencies should be required to establish ultimate goals for eliminating any identified disparities and annual hiring and promotion objectives for obtaining these goals.

c. The Commission should require agencies to review annually their ultimate goals and to report annually on the extent to which annual numerical objectives have been accomplished and whether ultimate goals have been revised.

d. Other components of agency affirmative action plans, such as descriptions of training or recruitment programs, should be submitted only every two or three years unless the agency fails significantly to meet its numerical objectives.

4. The Commission should substantially increase the frequency and quality of its evaluations of agency employment practices.

a. The Commission should conduct an evaluation of more than 25 percent of all Federal facilities with more than 100 full-time employees to determine compliance with the requirements of Title VII.

b. Evaluation reviews should include a systematic investigation to determine if agency hiring, placement, or promotion practices have a disproportionately adverse impact on minorities and women.

c. Where such impact is determined, the Commission should identify all individual members of the class affected and should order the agency to provide relief to these individuals in the form of back pay and preferential status for hiring, transfer, or promotion purposes.